TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible]

JOSEPH S. KAUFMAN, PLAINTIFF IN ERROR,

vs.

S. T. THEDWICK, TRUSTEE OF THE ESTATE OF GUSTAVE KAUFMAN, BANKRUPT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

(18,780.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 187.

JOSEPH S. KAUFMAN, PLAINTIFF IN ERROR,

vs.

W. T. TREDWAY, TRUSTEE OF THE ESTATE OF GUSTAVE KAUFMAN, BANKRUPT.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Certificate of presiding judge	1	1
Certificate of clerk	2	1
Certificate of clerk	3	1
Proceedings in court of common pleas	4	2
Docket entries	4	2
Summons	6	2
Præcipe for summons	7	3
Plaintiff's statement	7	3
Notice of filing statement (omitted in printing)	11	—
Affidavit of defense	13	5
Rule for judgment for want of sufficient affidavit of defense (omitted in printing)	20	—
Plea	23	8
Præcipe to put case on issue docket	23	8
Juror withdrawn and case continued (omitted in printing)	25	—
Motion to strike from trial list (" ")	26	—
Affidavit of William Kaufman (" ")	28	—
Gustave Kaufman (" ")	32	—
Answer to rule to strike (" ")	37	—

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 30, 1903.

	Original.	Print
Rule to take depositions (omitted in printing)	42	—
Notice of rule to take depositions (" ")	44	—
Testimony taken under rule (" ")	46	—
Testimony of William Kaufman (" ")	47	—
Gustave Kaufman (" ")	55	—
S. Schoyer, Jr. (" ")	62	—
Commissioner's certificate (" ")	65	—
Exhibit No. 1—Account (" ")	66	—
Notes of testimony and exceptions	74	9
Index	75	9
Official notes of trial	76	9
Testimony of W. T. Tredway	79	11
J. S. Kaufman	85	15
J. S. Kaufman (recalled)	86	15
Joseph Keeling	95	20
John J. Neelan	102	24
W. J. Leison	107	27
J. S. Kaufman (recalled)	109	28
Plaintiff rests	112	30
Testimony of J. S. Kaufman (recalled)	113	30
William Kaufman	126	38
Defendant rests	131	40
Charge to jury	132	40
Judge's certificate	136	42
Verdict	137	43
Motion and reasons for new trial	138	43
Opinion on motion for new trial	140	44
Sheriff's receipt for verdict fee	143	45
Memorandum as to paper books (omitted in printing)	144	—
Petition to supreme court of Pennsylvania for appeal from superior court	145	46
Opinion of superior court	147	47
Appellant's paper book	154	49
Assignments of error	154	49
Statement of questions involved	156	51
History of the case (omitted in printing)	157	—
Argument for appellant (" ")	159	—
Appellee's paper book (" ")	177	—
Motion for reconsideration of order refusing appeal	186	51
Reasons for reconsideration of order refusing appeal	187	51
Writ of certiorari from superior court to court of common pleas	192	53
Petition for writ of error	194	54
Allowance of writ of error	201	57
Assignments of error	202	58
Citation	207	60
Proof of service of citation	208	60
Writ of error	209	60
Bond on writ of error	212	62
Stipulation to omit parts of record in printing	216	63

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

James A. Beaver, presiding judge of the superior court of Pennsylvania, certify that George Pearson, by whom the foregoing attestation was made, was, at the date thereof, prothonotary of said court, sitting at Pittsburg, duly qualified; and the said attestation is in due form of law made by the proper officer.

of the Superior
ourt of Pennsyl-
nia, 1895.

testimony whereof, I have hereunto set my hand and affixed
eal of the said court the twentieth day of December A. D. 1902

JAMES A. BEAVER.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

George Pearson, prothonotary of the superior court of Pennsylvania, sitting at Pittsburgh, certify that the Honorable James A. Beaver, by whom the above certificate was given, and whose name is thereby subscribed in his own proper handwriting, was at the date thereof presiding e of the said court duly commissioned and sworn and acting.

of the Superior
urt of Pennsyl-
nia, 1895.

testimony whereof, I have hereunto set my hand and affixed
eal of the said court the twentieth day of December A. D. 1902.

GEORGE PEARSON,
Prothonotary.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

George Pearson, prothonotary of the superior court of Pennsylvania, sitting at Pittsburgh, certify that the record hereto attached is a full and correct copy of the whole record of the case wherein W. T. Tredway, trustee, is plaintiff and Joseph S. Kaufman is defendant, as the same remains ord before the said court at No. 147 of April term A. D. 1902.

of the Superior
urt of Pennsyl-
nia, 1895.

testimony whereof, I have hereunto set my hand and affixed
al of the said court this twentieth day of December A. D. 1902.

GEORGE PEARSON,
Prothonotary.

4 STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

JULY 24, 1899.

W. T. TREDWAY, Trustee of the Estate of Gustave Kaufman, Bankrupt,
vs.
J. S. KAUFMAN. } No. 790, August Term, 1899.

Sum's in assumpsit to 1st Monday August 1899. Aff't and statement filed. July 24 1899 service accepted for def't by S. Schoyer Jr. *et al.* att'ys for def't. Aug. 29 1899 proof of service of statement filed. Sept. 13 1899 aff't of defence filed. Oct. 18 1899 rule on def't for judgment for want of sufficient aff't of defence reasons filed *eo die* notice of rule served on def't's att'y. Feb'y 13 1900 on argument list and rule discharged. Feb'y 24 1900 plea filed. Dec. 14 1900 on trial list and jury sworn *eo die* juror withdrawn and cause *contained.* Oct. 5 1901 rule granted on plaintiff to show cause why this case should not be stricken from trial list *eo die* aff't of Wm. Kaufman and Gustave Kaufman filed. Oct. 12 1901 answer of W. T. Tredway trustee filed. Dec. 4 1901 rule *ex parte* def't to take depositions on rule on Dec. 9 1901 at 3 o'clock p. m. (att'y K. 50) Dec. 17 1901 testimony filed. Dec. 16 1901 on argument list and rule discharged. Jan'y 14 1902 on trial list and jury sworn. Jan'y 15 190- verdict for the plaintiff in the sum of thirteen hun-
5 dred and nine and 94/100 ($1309.94) dollars Jan'y 18 1902 rule on plaintiff to show cause why a new trial should not be granted. Mar. 22 1902 on argument list and new trial refused opinion filed. March 25 1902 sheriff's receipt (p'd by pl'ff's att'y) for verdict fee filed and judgment on the verdict Ap'l 11 1902 def't appeals to superior court *eo die* bond of def't with Sam'l D. Strasburger in the sum of $2800 approved and filed. Ap'l 11 1902 certiorari filed Ap'l 15 1902 notes of testimony and charges of court filed.

From the record.

[SEAL.] (Signed) A. J. McQUITTY, *Pro.*

Nov. 3, 1902.—Remittitur filed showing judgment affirmed. *Eo die* exemplification filed.

Dec. 10, 1902.—Supplemental writ to superior court filed.

6 THE COMMONWEALTH OF PENNSYLVANIA, } ss:
Allegheny County, }

To the sheriff of said county, Greeting:

We command you that you summon J. S. Kaufman so that he be and appear before our court of common pleas, No. 3, to be holden at the city of Pittsburgh, in and for said county, on the first Monday of August next, there to answer W. T. Tredway trustee of Gustave

Kaufman bankrupt of a plea of assumpsit, and have you then and there this writ:

Witness the Hon. John M. Kennedy, president judge of our said court, the 24 day of July A. D. one thousand eight hundred and ninety nine.

(Signed) A. J. McQUITTY,
Prothonotary.

[Endorsed:] No. 790 August term, 1899 W. T. Tredway trustee &c. *vs.* J. S. Kaufman. Summons in ass'mp't to first Monday of August 1899 Service accepted as per endorsement on back of writ So ans. Harvey A. Lowry sh'ff Sh'ff L. 1.25 Sh'ff L. .50. Stone & Potter att'y- for plaintiff.

Service of within writ accepted July 24th '99.

S. SCHOYER, JR.,
S. B. SCHOYER,
Att'ys for Defendant.

7 In the Court of Common Pleas No. 3 of Allegheny County, Pa.

W. T. TREDWAY, Trustee of Estate of Gustave Kaufman, Bankrupt,
vs.
J. S. KAUFMAN.
} No. —, August Term, 1899.

To A. J. McQuitty, Esq., prothonotary:

Issue summons in assumpsit in the above case, returnable *sec. reg.*

(Signed) STONE & POTTER.
Attorneys for Plaintiff.

Plaintiff's Statement.

W. T. Tredway, trustee of the estate of Gustave Kaufman, a bankrupt, duly appointed and qualified by and in the U. S. district court for the western district of Pennsylvania at court No. 7 in
8 bankruptcy, by Stone & Potter, his attorneys, complains of the defendant, J. S. Kaufman, who has been summoned to answer the plaintiff in a plea of assumpsit and for cause of action states as follows:

On August 20th, 1898, the said Gustave Kaufman filed his petition for adjudication in bankruptcy of himself and since said date has been duly adjudged and decreed a bankrupt.

That for four months or more prior to the filing of his petition for adjudication in bankruptcy of himself, said Gustave Kaufman was hopelessly insolvent, which insolvency was well known both to the said Gustave Kaufman and to the said defendant, J. S. Kaufman.

That on August 20th, 1897, the said Gustave Kaufman entered into a contract for the construction and paving of part of the Beechwood boulevard in the 23rd ward, Pittsburg, and in the prosecution of said work accumulated, purchased and acquired valuable tools and an efficient plant for the doing and performance of such construction work, worth approximately ten thousand ($10,000) dollars and on or about the 30th day of June, 1898, in order to indemnify said J. S. Kaufman, otherwise known as Joseph S. Kaufman, and other relatives of the said Gustave Kaufman for certain endorsements of notes made for the said Gustave Kaufman, and on the same date, to wit, June 30th, 1898, and by the same instrument of writing, sold, assigned, transferred and set over unto the said defendant, J. S. Kaufman, therein mentioned as Joseph S. Kaufman, all of the said contractor's plant, and also all the right, title, interest
9 claim and demand whatever the same may be or amount to of, in and to the household goods, furniture and effects of every kind, sort and nature then contained in the house No. 644 Maryland Ave. Pittsburgh, subject, however, to the title and claim of his wife, to the said household goods, furniture, and effects of the said Gustave Kaufman in said assignment reciting that she, his said wife, was the sole and absolute owner thereof.

The plaintiff further avers, that notwithstanding the premises, all of which was well known, both to the said Gustave Kaufman, the bankrupt, and to J. S. Kaufman, the defendant, the said Gustave Kaufman within four months before the filing of his petition as aforesaid, for the adjudication of himself as a bankrupt, to wit, on August 4th, 1898, but sixteen days before the filing of the said petition, gave a preference to the said defendant, J. S. Kaufman, over other creditors of the said bankrupt of the same class as the said defendant by paying to the said defendant J. S. Kaufman on the said date August 4th, 1898, the sum of four thousand eighty-six dollars and sixty-four — ($4,086,64) in violation of the act of Congress approved July 1st, 1898, to establish a uniform system of bankruptcy throughout the United States.

Wherefore by reason of the premises, the plaintiff avers that the said defendant at the time of receiving the said $4.086.64 had reasonable cause to believe that it was intended thereby to give a preference to him, the said defendant, which preference the
10 said plaintiff, trustee, has elected to avoid and therefore brings this suit to recover the said sum of $4.086.64 with interest thereon from August 4th, 1898 and costs of suit.

(Signed) STONE & POTTER,
Attorneys for Plaintiff.

ALLEGHENY COUNTY, ss:

W. T. Tredway, trustee of the plaintiff above named being duly sworn according to law, deposes and says, that the facts set forth in the foregoing statement are true and correct, as he verily believes.

(Signed) W. T. TREDWAY, *Trustee.*

Sworn to and subscribed this 22nd day of July A. D. 1899.

(Signed) A. J. McQUITTY, *Pro.*

10½-12 [Endorsed:] No. 790 August term 1899 W. T. Tredway, trustee of estate of Gustave Kaufman, bankrupt, *vs.* J. S. Kaufman. Præcipe and statement of claim. Is. July 24 1899. Stone & Potter attorneys at law.

13 In the Court of Common Pleas No. 3 of Allegheny County.

W. T. TREDWAY, Trustee of the Estate of Gustave Kaufman, *vs.* J. S. KAUFMAN. } No. 790, August Term, 1899.

Affidavit of Defense.

COMMONWEALTH OF PENNSYLVANIA, *County of Allegheny,* } *ss:*

Joseph S. Kaufman, reserving to himself all manner of exceptions to the manifold imperfections of the statement of claim filed in this cause, for answer thereto says that he has a just, full and true defense to the whole of the plaintiff's claim in this action as set forth in the said statement of claim, which defense is as follows, to wit:

In the month of May, 1898, this affiant endorsed a note made by Gustave Kaufman aforesaid for $3000, which said note was discounted by N. Holmes & Son and the proceeds thereof then
14 and there delivered to the said Gustave Kaufman for his use and benefit.

That during the said month of May, 1898, this affiant, together with Solomon Kaufman, Emanuel Kaufman, Sydney L. Kaufman and William Kaufman endorsed a note of the said Gustave Kaufman for $6000 made payable to them which was discounted by the Second National Bank of Pittsburg and the proceeds thereof were immediately given to the said Gustave Kaufman for his individual purposes in the business in which he was then engaged.

That at the time of the endorsement of the said $6000 note the consideration for the said endorsement was that he, the said Gustave Kaufman, should execute and deliver to the said endorsees of the $6000 note a bill of sale of his contractor's plant used by him in the construction and paving of part of Beechwood boulevard in the twenty-third ward of Pittsburg and all his office furniture and paraphernalia, including books, maps, plans, drawings, typewriter and furniture contained in his office rooms 808 and 809 Hamilton building, Fifth avenue, Pittsburg; and also all his right, title and interest in and to the household goods, furniture and effects of every kind, sort and nature contained in the house No. 644 Maryland avenue, Pittsburg; subject, however, to the title and claim of his

wife to the said household goods, furniture and effects, she being the sole and absolute owner thereof, as collateral security to this affiant for his liability upon the said $3000 note, and also as collateral security *pro rata* to the endorsers of the said $6000 note;

That the said bill of sale was, about the time of the said discounting of the said $6000 note, prepared, but remained unexecuted until the 30th day of June, 1898, upon which day the same was executed by the said Gustave Kaufman and delivered to this affiant and to the other endorsers of the said $6000 note, a true copy of which assignment and bill of sale is hereto attached and made part hereof.

Affiant further says that the assignment hereinbefore referred to and made part of this answer is the same referred to or intended to be referred to in the plaintiff's statement of claim as affiant believes; but if the said statement of claim is to be construed as meaning that the said assignment or bill of sale was made to this affiant individually, then he denies the averments of the said affidavit of claim that at any time any bill of sale or assignment such as is referred to in the said statement of claim was ever made to him.

Affiant further saith that the said Gustave Kaufman as contractor as described in the affidavit of claim was entitled by the terms of his contract to receive, and for a long period of time before August, 1898, had been receiving, the money earned by him under such contract in monthly estimates dated as of the first of each month but generally paid from the 1st to the 6th or 7th day of each month.

Affiant saith that the said Gustave Kaufman, being entitled to receive the money earned by him for the month of July by estimate as of the 1st of August, desiring to anticipate that estimate, requested this affiant to advance to him on said estimate certain moneys for pay-rolls to his men engaged upon the work of said contract, expressly promising and agreeing that the said estimate should be hypothecated and held for the use of this affiant to the amount of the moneys that he might so advance; and acting upon this express promise, this affiant, on July 7th, 1898, advanced upon the faith of the said arrangement the sum of $200; on July 22nd, 1898, the further sum of $100; and on July 29th, 1898, the further sum of $1500; all of which moneys were given to the said Gustave Kaufman; and as affiant is informed and believes and expects to be able to prove, were expended by the said Gustave Kaufman in the payment of pay-rolls to his men engaged in the performance of the said contract; that the amount of the said estimate for August it was expected would exceed $10,000, and that the said Gustave Kaufman expected to receive the same about the 4th of August, 1898.

That the amount of the estimate really paid to the said Gustave Kaufman amounted to about $6300 only caused by the refusal of the principal contractor to authorize a larger payment upon the said estimate; and the same was received on the 4th of August, 1898; and, as affiant is informed and believes and expects to be able to prove, said Gustave Kaufman applied $3000 of the same to the

payment of the note of $3000 hereinbefore referred to en-
17 dorsed by this affiant, and discounted by N. Holmes & Sons, and has used and did use so much of the remaining part of the said estimate for other purposes in the regular course of his business, so as to leave applicable to the claim of this affiant the sum of $1086.64, out of which, however, this affiant advanced to pay the labor claims remaining unpaid on the 8th of August the sum of $767; so that the said Gustave Kaufman is now indebted to this affiant in the sum of $1480.36.

Affiant denies that the said Gustave Kaufman gave this affiant a preference on August 4th, 1898, or at any other time, in any manner or form, or that he has received any sum of money at any time from the said Gustave Kaufman in violation of the act of Congress approved July 1st, 1898, to establish a uniform system of bankruptcy throughout the United States; that the said Gustave Kaufman had been for four months or more prior to the filing of his petition in bankruptcy, hopelessly or otherwise insolvent; or that if he were hopelessly or otherwise insolvent, that this affiant knew or had any knowledge of the said insolvency of the said Gustave Kaufman, or that the said Gustave Kaufman at the time of giving the said assignment or bill of sale and at the time of receiving these moneys from this affiant or at the time of the application of the estimates aforesaid by the said Kaufman, had disclosed his affairs which would in any wise justify this affiant in presuming that at the date aforesaid he was insolvent.

Affiant expressly denies that the property described in the said bill of sale or assignment was worth the sum of $10.000,
18 but he says that within the means of knowledge of the plaintiff, trustee in this cause, the original cost of the same was about $4500; and that at the time of the execution of the said bill of sale or assignment, the said property was deteriorated by ten months' use, and that the same has been since disposed of by the purchasers of the said plant, the endorsees of the said $6000 note, after the most strenuous efforts, for a sum not exceeding $3239.52, all of which is known to the plaintiff in this action; and the amount so received upon sale as aforesaid is reduced considerably by the expenses of sale and the cost of removal.

In addition to the said denials of the matters contained in the said statement of claim as aforesaid, this affiant further answering, avers that all of the transactions referred to in the said statement of claim were entered into in good faith; that the moneys were advanced without any knowledge of the insolvency of the said Gustave Kaufman, and the securities and repayments were made without knowledge of such insolvency and in pursuance of express promises given and entered into at the time the said various liabilities were incurred and moneys expended; and calls upon plaintiff to make proof of every averment in the said statement of claim to the contrary thereof.

(Signed) JOSEPH S. KAUFMAN.

Sworn to and subscribed before me this 12th day of September, A. D., 1899.

[SEAL.] MARY SULLIVAN,
Notary Public.

19–22 [Endorsed:] No. 790 August term 1899. W. T. Tredway, trustee of the estate of Gustave Kaufman, *vs.* J. S. Kaufman Affidavit of defense Filed September 13th 1899 S. Schoyer Jr. S. B. Schoyer att'ys for def't.

23 W. T. TREDWAY, Trustee, etc., *vs.* J. S. KAUFMAN. } No. 790, August Term, 1899.

And now Feb'y 14, 1900 comes the defendant by S. Schoyer Jr. & S. B. Schoyer his attorneys and pleads non assumpsit, with leave to set up special matter alleged in aff't of def.

(Signed) S. SCHOYER, JR., &
S. B. SCHOYER,
Att'y- for Def't.

SIR: Place above case on the issue docket

(Signed) STONE & POTTER,
Att'ys for Pl'ff.

P'gh, Feb'y 14, 1900.
To A. J. McQuitty Esq. prothonotary

24–73 [Endorsed:] 790 August term 1899. W. T. Tredway, trustee etc. *vs.* J. S. Kaufman. Plea & præcipe for issue docket Filed Feb'y 24th, 1900 Stone & Potter att'ys for pl'ff.

74 In the Court of Common Pleas No. 3, Allegheny County.

W. T. TREDWAY, Trustee of Estate of Gustave Kaufman, Bankrupt, *vs.* J. S. KAUFMAN. } No. 190, August Term, 1899.

Coram: Hon. S. A. McClung, J. and a jury.
For plaintiff: H. L. Castle, Esq.
For defendant: S. Schoyer, Jr., Esq.
Pittsburg, Pa. January 14th, 1902.

75 INDEX.

Plaintiff's Testimony.

	Dr.	Cr.	Re-dr.	Re-cr.
W. T. Tredway	5			
J. S. Kaufman	14			
W. J. Leison	18	25		
Joseph Keeling	27	34		
John J. Neelan	36			
W. J. Leison (recalled)	42			
J. S. Kaufman (recalled)	45			

Defendant's Testimony.

J. S. Kaufman (recalled)	51	59		
Wm. Kaufman	68	70		
Oral charge of the court	74			

76 In the Court of Common Pleas No. 3, Allegheny County, Pa.

W. T. TREDWAY, Trustee of Estate of Gustave Kaufman, Bankrupt, *vs.* J. S. KAUFMAN. } No. 790, August Term, 1899.

Coram: Hon. S. A. McClung, J. and a jury.
Appearances: For plaintiff: H. L. Castle, Esq. For defendant: S. Schoyer Jr., Esq.
Tuesday January 14, 1902, jury sworn.
Mr. Castle opens for the plaintiff.

Official Notes of Trial.

77 Counsel for plaintiff offers in evidence the averment of the affidavit of claim not denied by the affidavit of defense, to wit: That on August 20, 1898 said Gustave Kaufman filed his

petition for adjudication in bankruptcy of himself, and since said date has been duly adjudged and decreed a bankrupt. Admitted without objection.

"That on August 20, 1897 the said Gustave Kaufman entered into a contract for the construction and paving of part of the Beechwood boulevard in the 23rd ward, Pittsburg, and in the prosecution of said work accumulated purchased and acquired valuable tools and an efficient plant for doing and performing such construction work; and on or about the 30th day of June, 1898, in order to indemnify said J. S. Kaufman, otherwise known as Joseph S. Kaufman, and other relatives of said Gustave Kaufman, for certain endorsements of notes made for the said Gustave Kaufman, and on the same date, towit: June 30th, 1898, and by the same instrument of writing, sold, assigned, transferred and set over unto the said defendant J. S. Kaufman, herein mentioned as Joseph S. Kaufman, all of the said contractor's plant, and also all the right, title, interest, claim and demand, whatever the same may be or amount to, of, in and to the household goods, furniture and effects of every kind, sort and nature then contained in the house No. 644 Maryland avenue, Pittsburg, subject, however, to the title and claim of his wife to the said household goods, furniture and effects of the said Gustave Kaufman, in said assignment reciting that she, his said wife, was the sole and absolute owner thereof."

78 Mr. SCHOYER: That is objected to as irrelevant and incompetent, as not tending to prove that on the date of the alleged receipt of money Gustave Kaufman was insolvent or that the defendant had reasonable cause at that time to know or believe that he was insolvent.

The COURT: Well, this is not denied in the affidavit.

Mr. CASTLE: The fact is not denied.

The COURT: We will allow it to go in for the present. We will over-rule the objection and seal a bill for the defendant.

Counsel for plaintiff offers in evidence the following paragraph of the affidavit of claim as not being denied by the affidavit of defense: That notwithstanding the premises, all of which was known both to the said Gustave Kaufman, the bankrupt, and to J. S. Kaufman, the defendant, the said Gustave Kaufman within four months before the filing of his petition as aforesaid for the adjudication of himself as a bankrupt, towit, on August 4th, 1898, sixteen days before the filing of the said petition, gave a preference to the said defendant, J. S. Kaufman, over other creditors of the said bankrupt of the same class as the said defendant, by paying to the said defendant J. S. Kaufman on said date, August 4th, 1898, the sum of $4,086.64.

Mr. SCHOYER: That is denied specifically in the affidavit of defense.

Mr. CASTLE: The denial of it is not a denial of the fact. It is a denial that it was given in violation of the bankrupt act.

79 The COURT: But you offered the whole thing. If you simply offer the fact that he paid that amount to him on that

day, I presume it will not be denied; but you offer all the inferences that you draw from it as a fact.

Mr. SCHOYER: We deny that we received $3,000. at all.

Counsel for plaintiff withdraws his offer.

W. T. TREDWAY, sworn.

Direct examination by Mr. CASTLE:

Q. What is your business?

A. Practising law at the Allegheny County bar.

Q. What is your relation to Gustave Kaufman?

A. I am his trustee in bankruptcy.

Q. When appointed?

A. I was appointed on the fifth day of January, 1899.

Q. And have been acting ever since?

A. Yes.

Q. At the time you were appointed trustee in bankruptcy, did you get possession of Mr. Kaufman's books?

A. Yes, they were brought to me by Gustave Kaufman himself.

Q. Have you them here in the courtroom?

A. I have.

Q. Will you kindly identify Mr. Kaufman's check book for us so that we can use it?

A. There is one Second National book and two of N. Holmes & Sons.

(Books produced), and marked Exhibits Nos. 1, 2 and 3.)

Q. I show you Exhibit No. 4 and ask you to say what that is.

A. Well, I don't profess to be a book-keeper. There are three different books here. I think this would be what he called
80 his individual ledger, or individual accounts.

Q. The individual accounts with his various creditors and debtors are in that book?

A. Yes.

Q. And Exhibit No. 1 is what?

A. That is N. Holmes & Sons' check book.

Q. And Exhibit No. 2?

A. This is his check book at N. Holmes & Sons, No. 2 being the first one used and No. 1 being the second one used, in order of date.

Q. And Exhibit No. 3?

A. This is his Second National check book.

Q. Did you examine the books and accounts of Mr. Kaufman when they came into your hands?

A. I did.

Mr. SCHOYER: I object to this. If you attempt to prove that at the time this money was paid, which you allege we got, we had reasonable cause to believe that Gustave Kaufman was insolvent within the meaning of the act, and that he intended to show preference, then I raise the objection.

The COURT: We cannot anticipate that.

Mr. CASTLE:

Q. At the time the affairs of Gustave Kaufman were turned over to you, was there a schedule turned over as to the supposed assets of Gustave Kaufman?

Mr. SCHOYER: That is objected to. The schedule is the best evidence.

A. The schedule is there, the triplicate furnished me by
81 Mr. Kaufman, himself, coming from the referee in bankruptcy.

(Schedule produced and marked Exhibit No. 5.)

Q. Will you please take this Exhibit No. 5 and turn to the page wherein is given the summary of the supposed assets of Gustave Kaufman? Tell us the page.

A. Well, there are several pages in here and they are so designated that it is rather confusing. I can give you the items.

Mr. SCHOYER: The paper will show for itself.

Mr. CASTLE:

Q. There must be some sum total?

A. There is, on the last page if that is what you refer to.

Q. That is what I refer to.

A. I believe it is summed up here on page 3 of Schedule B.

Mr. SCHOYER: That is an answer to the question. That is where it is to be found?

A. Yes.

Mr. CASTLE:

Q. Now, how long had you this estate in your hands?

A. Since the fifth day of January, 1899.

Q. Will you state what effort you have made to realize upon the assets of Gustave Kaufman?

Objected to as irrelevant.

The COURT: What is the purpose of this offer?

Mr. CASTLE: If your honor please, as I understand it, we must do two things here: We must show that Gustave Kaufman was a bankrupt. Then, we must show further that J. S. Kaufman had knowledge of the fact that he was a bankrupt, or had reason to
82 believe that fact. Now, what I am seeking to do at this point is simply to lay the foundation for the second; I want to show as a matter of fact that Gustave Kaufman was a bankrupt and that it is demonstrated by the results in his estate; and then, of course, if I were to stop there, I would not have succeeded at all, but I will have to go on and connect J. S. Kaufman with that.

Mr. SCHOYER: If you make an offer within the act,—"that if a bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition and before

the adjudication, and that the person receiving it or to be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee" etc.,—if you propose now to follow this evidence by such other evidence as to show that on August 4th we were in the category mentioned in this act, then I shall not make objection.

Mr. CASTLE: I have no objection to making such an offer, to follow this testimony with such testimony.

The COURT: Then there is no objection. Proceed.

(Question read.)

A. I think I have made every effort that a reasonable man could make.

Q. Have you pursued the various creditors given to you in the schedule?

A. Yes. I have pursued the creditors, and I have investi-
83 gated and gone into every item in the way of an asset that is mentioned in that schedule.

Q. Will you tell us how much you have been able to realize from the estate of Gustave Kaufman up to the present time?

Mr. SCHOYER: That I object to, as incompetent and irrelevant.

The COURT: If the defendant insists on it, you will have to go over the different items, and show whether they are good or whether they are bad.

Mr. SCHOYER: The defendant admits that so far as the records show, on August 20th, 1898, the date of the petition of Gustave Kaufman, Gustave Kaufman, was insolvent; but we deny that whether he was solvent or insolvent on August 4th preceding that date, that we had any reasonable cause to believe that he was.

Mr. CASTLE: Would we not be permitted to show by the trustee that the assets that were turned into his hands, that were his on August 4th, and all that he had, are in such condition as to show that prior to this time of filing the petition, he was bankrupt?

The COURT: Certainly. We want to know the condition at the time that this payment was made.

Mr. CASTLE:

Q. Mr. Tredway, did you make an exaimnation of the books of the bankrupt that came into your hands?

A. I did; both the books and papers. I have here a paper that there was some dispute about at the last trial, and the case was really continued on account of it.

84 Mr. SCHOYER: Please confine yourself to the question.

Mr. CASTLE:

Q. Can you state from the books turned over to you by the bankrupt what his financial condition was on or about August 5th, 1898, preceding the filing of the petition in bankruptcy?

A. I can.

Q. Now, will you state what his condition was financially on or about August 5th, 1898?

Mr. SCHOYER: That is objected to unless it is also intended to prove that the defendant in this case, Joseph S. Kaufman was familiar with that condition of affairs.

The COURT: The counsel for plaintiff has in his opening and also in the case time after time repeated the statement that he does not claim that he has made out any case until he shows that. We cannot require him to repeat it every time that he puts a question to the witness. If he does not show it, we will turn his case out of court. But we cannot have the interminable delay of having a repetition of that in connection with every question. We cannot require him to propose that in every question that he puts, when it is freely admitted all around that that is essential to his case.

Mr. SCHOYER: Then I further object to this question as calling for a conclusion and not the facts.

The COURT: Well, I do not see that this witness has qualified himself to testify as an expert upon that subject. But let it be distinctly understood that we are going to hold the plaintiff to show not only the fact that he was insolvent but that the defendant
85 knew it, and that that is our reason for not requiring him to repeat his offer to prove the fact of knowledge; not the fact that it is not necessary.

Mr. CASTLE: Do the books and the check books of Gustave Kaufman show the payment of any monies to J. S. Kaufman, and if so, about what time?

A. The check book shows that J. S. Kaufman received a check for $3,000 on the fourth day of August, 1898. They also show that he received another check on the same date. Check No. 348, August 4th, 1898, for $3,000, was made to the order of J. S. Kaufman.

Mr. SCHOYER: You have the checks, Mr. Castle?

Mr. CASTLE: No. I have not the checks. We have simply the check stubs.

The COURT: Well, the check stub does not show the payment.

The WITNESS: I had the check, but it has been mislaid, or somebody borrowed it.

Mr. CASTLE:

Q. You have not got the checks themselves?

A. No, I have not the checks.

J. S. KAUFMAN, the defendant, called as for cross-examination by Mr. Castle, being duly sworn, testified as follows:

(Here court took a recess until one o'clock p. m.)

86 Afternoon session.

J. S. KAUFMAN recalled as for cross examination by Mr. Castle.

Q. You are the defendant in this case?
A. Yes.
Q. And a brother of Gustave Kaufman for whom Mr. Tredway, the plaintiff, is acting as trustee?
A. Yes.
Q. And of course, you knew your brother in August and prior to August 1898?
A. Yes.
Q. Upon August 4th, 1898 did you have some business dealings with your brother, and prior to that?
A. Yes, I had some business dealings with him.
Q. On August 4th, 1898 your brother gave you a check for $1086.64 did he not?
A. I think that was the date.
Q. And that was the amount?
A. Yes, $1086.64.
Q. That, if I remember your testimony before, was on account of some monies that you had advanced to him?
A. Yes.
Q. On the same day he made a check to your order for $3,000, did he not?
A. Well, I don't know how to answer that.
Q. Well, can't you answer it yes or no, and then you can explain, you understand, later?
87 A. Yes.
Q. He did make a check to your order?
A. Yes.
Q. As I understand it, from your testimony before, you had been endorsing some paper for him?

Mr. SCHOYER: I object to the use of the expression his "testimony before." That is not in evidence. Ask him the questions just the same as if this case had not been tried before.

Mr. CASTLE:

Q. It is a fact that you had been endorsing some paper for your brother?
A. Yes.
Q. And there was a note in N. Holmes & Sons' bank for $3,000. due about that time?
A. Yes.

Q. And you were the endorser on that?
A. Yes.
Q. And this three thousand dollar check was made payable to your order, and by you endorsed over to N. Holmes & Sons, to pay that three thousand dollar note? Is that right?
A. May I explain?
Q. Answer yes or no, so we can have the record, and then you can explain.
A. Yes.
Q. Now, make any explanation you want to.
A. It appears that on August 4th my brother Gus' bookkeeper brought the check to me in my office in the Times building
88 and told me that they wanted to lift that note at N. Holmes & Sons. I asked why the check was made to my order, and he said he didn't know, he was sent there; and I said "I will endorse it and you can go and lift the note, as you please; so I endorsed it "Pay to N. Holmes & Sons" with my name.
Q. It is a fact that that note was made payable to your order and by you endorsed?
A. Yes.
Q. And discounted at N. Holmes & Sons for the credit of your brother?
A. Yes.
Q. And in the event of its non-payment, of course, you would have had to pay it?
A. Very likely; I don't know; it wasn't supposed so when I endorsed it.

Mr. SCHOYER:

Q. The note had not matured at that time, had it?
A. I don't know; I don't remember.
Q. Well, had you received any notice of protest?
A. No.

Mr. CASTLE:

Q. Then as I understand it, a note was being paid that had not yet come to maturity?
A. I couldn't tell you that.
Q. You don't know whether it had been protested or not?
A. No, I don't.

W. J. LEISON sworn.

Direct examination by Mr. CASTLE:

Q. Where do you live?
89 A. Coraopolis.
Q. What is your business?
A. Chief clerk of accounts, Pittsburg & Lake Erie railroad.

Q. Are you a bookkeeper?
A. Yes sir.
Q. How long have you been such?
A. Well, since I was 17 years old.
Q. About how many years?
A. Well, I am between 53 and 54 now.
Q. And have you had any experience in auditing accounts?
A. I am an auditor virtually all the time. That is my position with the Pittsburg & Lake Erie railroad now,—and have been for the last seven years.
Q. Have you had experience in examining books with a view to determining their condition, and what they would show?
A. Yes, sir.
Q. For all these years that you have told us of?
A. Well, not continuously.
Q. Well, for how many years?
A. I have been keeping books all these years, but not examining books officially, as it were; still at the same time I consider myself competent to do so. Because I am able to keep books, I think I should be able to examine them.
Q. Did you examine the books of Gustave Kaufman?
A. I did.
90 Q. And papers?
A. I did.
Q. At whose instance and request?
A. W. T. Tredway's.
Q. The trustee?
A. I understood so; the trustee in bankruptcy.
Q. For what purpose did you examine the books?
A. Well, I examined them for the purpose of ascertaining some facts that the trustee wanted to find out.
Q. With reference to what?
A. With reference to receipts and payments.
Q. And anything with reference to the financial condition of Gustave Kaufman?
A. Principally.
Q. Can you say to us what period of time your examination covered as disclosed by the books?
A. Well, my examination covered, as far as I can remember,—although I have papers in my pocket now that I used at the time, it was about August 20th, 1897 until August 20th, 1898, just about one year.
Q. One year prior to his going into bankruptcy?
A. One year prior to his going into bankruptcy, if he went into bankruptcy on August 20th, 1898.
Q. That was a complete examination of the books and papers placed in your possession by Mr. Tredway?
A. Yes.
Q. Will you state, from your investigation of those books, what

the financial condition of Gustave Kaufman was during
91 the year prior to his filing his petition in bankruptcy?

A. Well, generally he had no financial condition at all; he was simply borrowing money and working on borrowed money. He didn't have any of his own that I could find, except a little bit at the start.

Q. Could you discover from his books how much money he had of his own, say in August 1897?

A. Well, in August 1897, taking it at the date that the line was drawn, August 20th if I remember correctly, he had between one and two hundred dollars in cash.

Q. From that time until the time of the filing of his petition in bankruptcy, what did you discover from his books that he had in the way of money, and how did he get it?

A. Well, the way he got money was by borrowing from the Kaufman Hat and Fur Company, J. S. Kaufman and others, and besides that, the estimates which he received from the city of Pittsburg, which were discounted at N. Holmes & Sons bank. The other notes,—I presume there were notes, because there were no notes in evidence among the papers,—I presume that there were notes discounted at the Second national bank; principally at the Second national bank.

Q. Did your investigation of the books disclose payments made to Joseph S. Kaufman any time in August 1898?

A. They did.

Q. What payments?

A. Well, there was one payment, if I may be allowed to refer to my notes, there was one payment of $1084. and another payment of $3,000.

92 Q. Refer to your notes and refresh your recollection as to the amounts.

A. In this return I show that he got altogether $4,084.64; that was the one check for $1084.64 and the other for $3000. That is the check that was given on the 4th of August. In fact, they are both marked here as if they were given on the 4th of August. I can't state positively whether that is the fact or not. One check is No. 348. The other check is not here. The No. 348 check was the three thousand dollar check. I believe, and that check, the reason I charged it up to him is that the check was made payable to the order of J. S. Kaufman and endorsed by him to N. Holmes & Sons. That was what I got from the endorsement on the check. If you will allow me, I will state what payments I found on the book, and the exact date. They were both August 4th. One was check No. 344 for $1086.64; the other was check No. 348 for $3,000.

Q. From your examination of the books of Gustave Kaufman, will you tell us what his financial condition was on August 4th, 1898 when these payments mere made?

A. Well, the statements that I have made and his own books themselves showed that he was utterly bankrupt at that time, owed a great deal more money than he had the equivalent to pay with.

Q. Can you tell us from your examination of the books as to his financial condition say in May of 1898?

A. Well, from my general examination of the books and from the books themselves, his financial condition in May 1898
93 was not any better than it was in August 1898, in other words, I believe that he was in an embarrassed condition then.

Q. That is, your idea is that he was a hopeless bankrupt all the way through 1898?

A. Well, I would say he was in an embarrassed condition. I would not say that he was hopeless, for he could get himself helped out.

Q. But in May you say the books would show that he was in as bad condition as he was in August?

A. I would say so.

Q. Do the books indicate to you whether or not Gustave Kaufman was carrying on any other business or had any other financial resources than the Beechwood boulevard matter at this time in the summer of 1898?

A. There was only one other thing that he had, and that never developed; there was a certain business and I can't think now what it was, some electric company out West, but there does not seem to have been anything made out of that. It was all expenditure. It was shown by the book- that he paid several hundred dollars in some kind of experiment; it wasn't any business transaction. So far as the books were concerned, it would not show anything except that he was possibly trying to get another contract of some kind, but the books only show that vaguely. That is the only thing outside of the Beechwood boulevard that he had any real transaction in, so far as the books were concerned.

Cross examination by Mr. SCHOYER:

Q. What time did you commence this examination?

94 A. Well, I couldn't just state exactly. I made my return April 24th, 1899. I commenced the examination about two months before that; probably it might be only six weeks, but it seems to me, if I can remember, about two months that I was working at it.

Q. Do you know Joseph S. Kaufman?

A. I do not.

Q. You had no conversation with him?

A. No, sir, not to my knowledge.

Q. On this subject, I mean.

A. Not on this subject, no, sir.

Mr. CASTLE:

Q. Prior to August 4th, 1898, do the books disclose any business relations between Gustave Kaufman and Joseph S. Kaufman?

A. Why, yes, on July 24th, I think it was, the books show a re-

ceipt of so much cash from J. S. Kaufman,—several items it shows; I can refer to them, if you wish.

Q. Do those items extend back through the entire year or at intervals through the entire year?

A. Just a short time; I think they are principally in July; I think they are all in July except one item.

Q. Do you recall anything that the books disclose as to business relations or notes discounted in December of 1897 or January of 1898 signed by Joseph S. Kaufman?

A. I cannot testify to that because there are none shown in his account; and as I have said before, the notes were not in
95 evidence in the papers. I couldn't find any notes.

Mr. SCHOYER:

Q. These entries that you find of cash paid by Joseph S. Kaufman show that Gustave Kaufman, the bankrupt, had received that amount of money?

A. That is what the books show, and the cash book showed it,—that he received those items of cash from Joseph S. Kaufman.

Q. Whatever they were, in that way Gustave Kaufman got the money?

(Witness does not answer.)

Q. I show you Exhibit No. 2 and ask you to look at it and then see if it refreshes your recollection.

Objected to because the witness did not make the entries. He cannot refresh his recollection with some person's else entries.

The COURT: No, he cannot do that.

JOSEPH KEELING, sworn.

Direct examination by Mr. CASTLE:

Q. What is your business?

A. General contractor.

Q. In 1897 and 1898 what was your business?

A. Same thing, general contractors.

Q. A member of the firm of Keeling and Ridge?

A. Yes, sir.

Q. Do you know Gustave Kaufman?

A. I do.

Q. Did you know him in 1897 and 1898?

A. I did.

Q. Do you know Joseph S. Kaufman?

A. I know Joseph S. Kaufman, yes, sir.

96 Q. Did you know him in 1898?

A. I knew him in 1898, yes, sir, I think in January 1898 was the first time I met him.

Q. Did you have business dealings with Gustave Kaufman in the spring of 1897 and the fall of 1898?

A. Yes, sir, we were furnishing him with stone from our quarries for his work on the Beechwood boulevard.

Q. When did you begin to furnish him with stone?

A. I think some time in October 1897.

Q. For how long a period did you continue to furnish him with stone?

A. I furnished him in the month of October, November and December; then I had stopped a while in January, and then continued again in February, March, April, May and June, I think, and July.

Q. Was Gustave Kaufman indebted to you at the time he went into bankruptcy?

A. He was.

Q. How much?

A. About $13,000. That is, he was indebted to the firm.

Q. You say you discontinued sending him stone in January 1898? Why did you do that?

A. Because he sent me word——

Mr. SCHOYER: What do you propose to prove?

Mr. CASTLE: I propose to prove by the witness on the stand that in January, 1898, Gustave Kaufman, then being indebted to him in quite a large sum of money, and his notes having gone to
97 protest,—that he declined to sell any more stone to Gustave Kaufman; whereupon he was telephoned for to come to the office of Joseph S. Kaufman in the Times building, city of Pittsburg, where he met Joseph S. Kaufman and Gustave Kaufman, and there discussed the financial condition of Gustave Kaufman with both Gustave Kaufman and Joseph S. Kaufman, the defendant here; and that Joseph S. Kaufman there told him that Gustave Kaufman was not a good financier and that he was in bad shape financially, and that he Joseph S. Kaufman was going to take charge of his affairs; and assured the witness that if he would continue to ship stone to him, that he would see that it was paid; whereupon the witness continued to ship stone until the month of June, accepting promissory notes for the same, upon the express promise of Joseph S. Kaufman that he would see that they were paid; this for the purpose of showing, first, the bankrupt condition of Gustave Kaufman; second, the knowledge of Joseph S. Kaufman of his bankrupt condition.

Mr. SCHOYER: That is objected to as irrelevant and immaterial. It is too remote. It has nothing to do with the question, of whether or not on the 4th of August Joseph S. Kaufman had reasonable cause to believe that at that time Gustave Kaufman was bankrupt, and that the money that he was then receiving was preferential within the meaning of the act.

Objection overruled.

To which ruling counsel for defendant requests an exception. Exception allowed and bill sealed.

(Question read.)

For the reason that he had sent word to the office that the
98 note which was to come due in a day or two, that he would not be able to pay.

Q. And what did you do?

A. I sent word from the office to the quarries to discontinue shipments?

Q. Why?

A. Because he had enough stone that I had no money for then.

Q. How much at that time did he owe you?

A. Between $5,000 and $5500.

Q. What did you do next in relation to this matter? Were you sent for?

A. I was sent for by Mr. J. S. Kaufman and Mr. Gus. Kaufman.

Q. When?

A. It was sometime in January, I think.

Q. Where?

A. At the Times building at Mr. J. S. Kaufman's office.

Q. Did you go there?

A. I went there one morning, yes, sir.

Q. Whom did you find there?

A. I found Mr. J. S. Kaufman there, and introduced myself to him. That was the first time I met him.

Q. Was there anybody else there besides Mr. J. S. Kaufman?

A. We waited a few minutes, and then Mr. Gus. Kaufman came in.

Q. Then what did you discuss?

Objected to, the proper question being what was said.

Q. What was said?

99 A. Well, we just talked about getting our money, that was all.

Mr. SCHOYER: Let us have the conversation. What was said at that time, and who said it.

Mr. CASTLE:

Q. What did you say about the matter of your money?

A. I said I wouldn't ship him any more stone unless I would get my money, or get some guarantee.

Q. To whom did you say that?

A. To J. S. Kaufman and Gus. Kaufman.

Q. How did you come to say that to J. S. Kaufman?

A. He said he wanted to see whether he couldn't fix matters up for his brother.

Q. When you said you couldn't ship any more stone, then what was said to you?

A. We talked the matter over about the conditions and so on of his work going on, and how much he had laying idle, and wasn't finished yet, and couldn't get no estimates and so on; and I told him if we could make some satisfactory arrangements for the money, we would ship; and he said he would see that I would get

my money after this, and then I was to take care of this note that was to come due in two days.

Q. Who said that he would see that you would get your money?

A. J. S. Kaufman.

Mr. SCHOYER: He hasn't finished that answer yet.

The WITNESS:

A. This note of $2600. that was to come due in a day or two.

100 Mr. CASTLE:

Q. Who was to take care of that?

A. Keeling & Ridge, and we were to receive a new note for the whole amount.

Q. Did you receive the new note?

A. Then I received a note for five thousand and some dollars.

Q. What, if anything, did Mr. J. S. Kaufman say to you in connection with the business, or his taking charge of the business?

A. He didn't say he would take charge of the business; he said Gus didn't have much idea of financiering and handling the money question, and he was going to help him out on that point.

Q. On what point?

A. On the financial end of it.

Q. That is, that Mr. J. S. Kaufman was going to help his brother out?

A. Yes.

Q. That, you say, was some time in January?

A. Some time in January; it was a few days before that note was due.

Q. Then you continued to ship stone?

A. Then after that arrangement was made with Gus. and J. S. Kaufman, I gave orders to my quarry to continue shipments, and to receive notes in payment.

Q. Did you have any further conversation at any time with either J. S. Kaufman or Gus. Kaufman?

A. I don't think I had with J. S. Kaufman, but I done most of my business then with Gus. Kaufman, and two or three times,

101 I think, after that, I would meet him and talk to him about it, and settle up with a note.

Q. Well, from that time out did he ever pay you any money at all?

A. Not from that on, no.

Cross examination by Mr. SCHOYER:

Q. In January this conversation occurred?

A. Yes, sir.

Q. And you continued then, as you have stated, to furnish stone from that time on?

A. After we left; I think it was a day or two or three until we got started to ship stone again.

Q. And you would take notes?
A. We would take notes, yes.
Q. The amount due you at the time Gustave went into bankruptcy you say was $13,000.
A. About $13,000.
Q. What notes were those? Were they book accounts or notes?
A. The last month, I think, we didn't receive any note. That would be book accounts, but the months before that we received notes; so it would be book account and notes.
Q. In this conversation you had with Joseph about the financial end, what do you mean by the financial end?

(Witness hesitates.)

Q. What I mean by that is, what did Joseph say to you?
A. He said that Gus. didn't look out for this money question, handling the financial end of the concern.
102 Q. That is, watching the books?
A. The money and pay-rolls and such things as that; and that he laid things around and would leaves notes get overdue and so on, and he was going to take care of that.
Q. As bookkeeper?
A. No, I understood him as money man, to help him out with his money matters.
Q. What did he say to you that led you to that impression?
A. Because he said that he would see that these notes were paid when they came due.
Q. And you continued shipping?
A. After that we continued shipments until the last payment was refused, or we were notified that he went under.
Q. Well, you were satisfied with the explanation then made, and you continued shipping?
A. Yes, sir.
Q. Did you get any of Joseph's endorsements?
A. No.
Q. You were satisfied with Gustave's notes?
A. I was satisfied with that, after the conversation with him, and from what I heard, I would do anything that was right, and I expected that Gus. would do the same thing, at the time.

JOHN J. NEELAN sworn.

Direct examination by Mr. CASTLE:

Q. What is your business?
A. Bookkeeper of the Keeling & Ridge Company.
103 Q. How long have you been with them?
A. About twelve years.
Q. Then you were with the Keeling & Ridge Company in 1897 and 1898?
A. I was, yes, sir.

Q. Do you know Gustave Kaufman?
A. I do.
Q. Do you know Joseph S. Kaufman?
A. I know him to see him. I ain't personally acquainted with him.
Q. When did you first become acquainted with Gustave Kaufman?
A. I think it was along about August 1897 to the best of my recollection.
Q. In what connection?
A. Why, he called our office up one day, and asked if he couldn't get a price on some crushed stone and block stone to use on the Beechwood boulevard.
Q. And then you opened an account with him?
A. We did, after Mr. Keeling had made arrangements.
Q. Then you continued shipping stone to him through 1897 and 1898, did you?
A. Up to about August 3rd *of* 4th, I think.
Q. Did you have charge at any time of making collections against Gustave Kaufman?
A. I did.
Q. When did you first take up the matter of collections against Gustave Kaufman?
104 A. I did at certain periods as I rendered him a monthly statement of account, and generally called at his office to have the thing checked up and afterwards we got notes from time to time.
Q. When did that begin?
A. I think about five or six weeks after the first shipment, that is, the beginning of the first shipments.
Q. When did you become anxious on the question of whether you were going to get your money or not?
A. Why, along about January,—I think January, 1898.
Q. Well, at that time did you have any conversation with Gustave Kaufman?
A. I did, yes, sir.
Q. Did you see J. S. Jaufman at *at* that time?
A. Not at that time. At a later period.
Q. Not until later?
A. No.
Q. Now, coming to that time, when did you first see J. S. Kaufman in connection with this matter?
A. The first time I ever saw J. S. Kaufman to my recollection was August 5th, 1898.
Q. And where was that?
A. In Mr. Gustave Kaufman's office.
Q. When was that?
A. August 5th, 1898.
Q. In the morning or when?
A. In the afternoon.

105 Q. When you went into that office, were they both there, or did they come in later?

A. They were both there.

Q. Why did you go there?

A. I went there to collect our account.

Q. Did that conversation that you are now relating to us take place on August 5th, or June 5th?

A. August 5th.

Q. What was the conversation which you had at that time?

A. Well, after I came in there, Mr. Gustave Kaufman and Mr. Joseph S. Kaufman were sitting down, and Gustave Kaufman said "Well, Neelan, I suppose you are after money." I says "That's just what I am after." He says "I am very sorry to tell you that I can't do anything for you just at present; things are in such shape that I really can't give you any money, but if you will take a note from me, I will give you a note right now." I told him "We don't want any note; we want money." So that ended that part of the conversation. Mr. Joseph S. Kaufman was there at the time that this took place.

Q. Was anything said at that time about the matter of having made an assignment?

Mr. SCHOYER: What was said?

Mr. CASTLE:

Q. Well, what was said with reference to that matter?

A. The assignment?

Q. Yes.

106 A. The conversation in regard to the assignment occurred the next morning.

Q. Where was that?

A. That was in Mr. Gustave Kaufman's office.

Q. Who was present at that time?

A. Why, I think his brother's name was Ben. Benjamin Kaufman, and Mr. Gustave Kaufman was there.

A. And what was said then with reference to the assignment?

Mr. SCHOYER: That I object to, Mr. Joseph S. Kaufman not being present at the time.

Mr. CASTLE: I want to show with reference to the man's financial condition actually, that he made a statement at the time with reference to having assigned everything that he had to this defendant.

The COURT: His statements are not evidence. He is not a party here. And they were not made in the presence of the defendant We cannot admit them. You can show all these facts, but you must show them by competent evidence, not by the declarations of any outside party, and Gustave Kaufman is an outside party in this case.

Mr. CASTLE:

Q. Do you recall any other conversations with Joseph S. Kaufman

either at his brother's office or elsewhere, with regard to this matter, that you had?

A. That was the only conversation that I had with Joseph S. Kaufman or in his presence.

No cross examination.

107 Upon call upon the defendant, the defendant produces Exhibit No. 6, being a paper dated the 30th day of June 1898, signed by Gustave Kaufman, assigning to Joseph S. Kaufman and others certain material therein enumerated.

W. J. LEISON, recalled.

Direct examination by Mr. CASTLE:

Q. I show you Exhibit No. 6 and ask you to look over the items set forth in that exhibit. Can you tell us from your examination of the books in this matter what the cost to the contractor of the plant set forth in that exhibit was?

A. Well, I can testify from an examination of the books what the plant cost. This is supposed to be, I presume, a transfer of the plant, that is, turned over as an equivalent; this is where the plant is turned over as a security, I believe, for a note.

A. Well, now, will you tell us what the books show the cost of the plant was?

Mr. SCHOYER: I wish you would state whether you mean to ask him about the original cost of the plant itself or what the items of the books are, which include labor and a number of other things which do not go into the cost of the plant at all.

Mr. CASTLE: My purpose is to show what the plant was valued at or stood Gustave Kaufman at the time that he made the assignment to Joseph S. Kaufman and others.

Mr. SCHOYER: A great deal of money was expended in and about this plant in labor, and that appears in that account too, which really does not constitute any part of the plant; but it was money expended in and about that plant in putting it in opera-
108 tion.

Mr. CASTLE:

Q. Can you separate them?

A. I can only testify as to the actual cost of the plant from the books and what was paid and *and* what was not paid on it.

Mr. SCHOYER: Then I object.

The COURT: There is nothing before us to indicate that this would throw any light on the investigation.

Mr. CASTLE: In the affidavit of claim it is alleged, and it is admitted, that this assignment constituted practically everything that this man had; and it is made as collateral security for a three thousand dollar note; and we propose to show now what the value of the plant was and then we will show that this three thousand dol-

lar note is the three thousand dollar note that was paid here; and there is no accounting over

The COURT: Well, you are suing here, as I understand, for the amount of these two checks?

Mr. CASTLE: Yes, sir, and I want to show by this line of examination the animus of this whole transaction, and how it has been tainted from start to finish, and a part of that is the assignment to Joseph S. Kaufman of a large and valuable plant.

The COURT: You can show all these facts; but the question here is whether you can show what the books indicate that plant cost. That is the only question we have before us. I cannot see what the cost of the plant has to do with it.

Mr. CASTLE: Only this: that the cost would throw some
109 light on the question of its adequacy or whether it was an exorbitant thing, or whether it would show by the very fact that it was so largely in excess of the value of the amount that it was intended to secure, that it would look as if the whole thing was to be cleaned up.

The COURT: The answer to that is that we do not want the cost, but we want the value of it at the time.

J. S. KAUFMAN recalled.

Examined by Mr. CASTLE:

Q. I show you, Mr. Kaufman, Exhibit No. 6, and call your attention on the second page to a recital of a three thousand dollar note in N. Holmes & Sons' bank. Is that the note as to which you testified to us a few moments ago that you were endorser on, and which was paid by this check?

A. Yes.

Q. And this was given as collateral security for the payment of that note?

A. This paper was really executed for the purpose of securing the various brothers for a note of six thousand dollars which was endorsed by us jointly, and then in addition to that, whatever security would be needed for the three thousand dollar note.

Q. Did you endorse for your brother in January 1898?

A. I couldn't tell you.

Q. I show you Exhibit No. 2. Is that in Gustave's handwriting, or do you know?

A. I don't know; I wouldn't say positively; it looks very much like it.

110 Q. Without reading it aloud,—do you read where my finger indicates there?

A. Yes.

Q. Does that refresh your recollection any on the question of your endorsements?

A. No, it does not. I endorsed several times for my brother; but I don't believe I was liable for any endorsements at the time excepting the six thousand dollars and the three thousand dollars.

Q. But you had endorsed for him prior to that time?
A. Yes, I think I had.
Q. Quite a number of times?
A. No, not often. I had several times though, yes.
Q. Now, at the times that you endorsed for him before that, did you take any collateral security?

Objected to as irrelevant.

A. I don't remember that I did.

The COURT: You have some paper there that you are dealing with that you have not offered in evidence and I know nothing about; and my ruling will have to be on the assumption that the contents of that paper are not known. I cannot see what this has to do with it, in view of those facts. Exhibit No. 6 is not in evidence, and I have no knowledge of what it purports to be, except by conjecture. With matters in that shape I cannot see what this has to do with the case.

Mr. CASTLE: I then offer in evidence Exhibit No. 6 for the purpose of showing the assignment to Joseph S. Kaufman, the defendant here, in connection with others, in June of 1898, of the
111 entire estate of Gustave Kaufman.

Objected to as incompetent and irrelevant; and further for the reason that it does not show that he was parting with his entire estate.

Objection overruled.

To which ruling counsel for defendant requests an exception. Exception allowed and bill sealed.

Mr. Castle: reads to the court and jury Exhibit No. 6.

Q. Now, Mr. Kaufman, why did you take this assignment at this time in June?
A. Well, I don't know that I had anything very particularly to do with it. It was a general agreement among us, and recommended by my brother Will, who is an attorney.
Q. Was that done after a sort of family consultation?
A. Well no, just a consultation among the brothers who were endorsing.
Q. And at the time of the consultation I presume you went over Gustave's affairs somewhat?
A. No, we listened to what he had to say to us.
Q. And then concluded that you had better take this assignment?
A. No, we then concluded that we had better do what he asked us to do.
Q. That is, to endorse for him and help him out?
A. To endorse a note for $6,000.
Q. And help him out?
A. I don't say to help him out. I say that that endorsement was made at his request because he wanted to use it in business
Q. And then you took this assignment?

A. Yes, I suppose. He offered that against it.

112 Q. Now the endorsing was done in May, was it?

A. I don't remember the date of it at all; I don't know when that was. But I know that the two were really done together. They may not have been both executed, but they were done at the same time.

Q. They were contemplated at the same time?

A. Yes.

Plaintiff rests.

Mr. SCHOYER: I fail to find in the evidence anything to comply with the statute; the burden being on the plaintiff to show that the bankrupt had given a preference within four months and that the persons receiving it were to be benefitted thereby or should have had reasonable cause to believe that it was intended thereby to give a preference. It seems, so far as the three thousand dollar note was concerned, that the liability on the defendant here was not fixed; the note had not been protested; and the money went to N. Holmes & Sons. The defendant did not get any of it. The evidence does not even show that the bankrupt had stopped business at the time, or but that he was going on in the regular course of business. There is nothing here to indicate that the defendant knew that Gustave Kaufman was not going to continue the business, or that he had suspended,—or to show that this money had not been paid in the regular course of business, or that there was any intent to prefer. On the contrary, the statement of this defendant who was put upon the stand goes to show (so far as he has not been contradicted,

113 and he has not been) and everything goes to show that he was paying money out,—why should he give money to a person who was supposed to be a bankrupt? Why should he let him have money at all to pay out these notes if he supposed that he was going to lose his money, or that Gustave Kaufman was bankrupt?

The COURT: Well, we cannot non suit. There is evidence here that the defendant knew a good deal about this business.

JOSEPH S. KAUFMAN recalled.

Direct examination by Mr. SCHOYER:

Q. You heard the testimony of Mr. Keeling?

A. Yes.

Q. I wish you would recite your recollection of that occurrence

A. I can't recall the date, neither the month nor the time of the month, and am under the impression that the interview Mr. Keeling referred to was prior to that time, but I wouldn't say positively; but there was nothing in that interview to give Mr. Keeling any impression——

Objected to.

Mr. SCHOYER:

Q. Did you or did you not in that interview say to Mr. Keeling either in words or in substance, that you were going to take charge of the finances and run that part of the business for your brother?

A. No, sir.

Q. Do you recollect what you did say?

A. Yes.

Q. Well, state it.

A. I said that I would be willing to do the banking part of

114 Gus' affairs.

Q. What do you mean by that?

A. I mean taking the paying out of money, "O. K." his bills, and look after it in that way.

Q. At that time what was your knowledge of your brother's financial condition?

A. Do you mean my absolute knowledge of what it really was?

A. Yes, at that time.

A. I was under the impression that he was in good shape.

Q. Had you any interest in his business in any way?

A. Not a dollar.

Q. Did you, in point of fact, take charge of his business?

A. No, it didn't come around at all that way, and that was the last reference there was to that.

Q. Did you in any way say to Mr. Keeling that you would see that Mr. Keeling would be paid?

A. No, sir, I did not. I said to Mr. Keeling that I didn't think he would lose a dollar on Gus. That I said, and I said that because of my general knowledge of Gus' character.

Q. Well, was there anything brought to your attention at that time that led you to believe that your brother Gustave was insolvent at that time?

A. No, sir there was not.

Q. Do you know in what way your brother derived his money in this boulevard contract,—in what way or how often he was paid on the boulevard contract?

A. He was paid through warrants from the city, or estimates.

Q. Once a month?

115 A. Yes, sir.

Q. Coming down now to the time of this collateral security, I wish you would state the circumstances under which Exhibit No. 6 was made.

A. My recollection of that is that Gus said that he would be somewhat short of money, and asked us to assist him, to give him whatever money would be necessary to operate the business; that he was short of working capital, that he would have to expend monies during the month, and always had to wait until his estimates came in, to discharge them, and that if he had some ready money, he could get along so much better, and after consultation, after considerable argument in which he told us that he was in first class shape, we

agreed to endorse for him for six thousand dollars, taking as collateral security this paper.

Q. That collateral was for the $6,000 which you and your brothers endorsed at that time?

A. Yes.

Q. Gustave got the money from that? That went into his business did it?

A. Yes.

Q. And the three thousand dollars was your individual endorsement?

A. Yes.

Q. And he got the money from that?

A. Yes.

Q. And that went into his business?

A. Yes.

Q. Do you know how it came that there was a discrep-
116 ancy in dates between that assignment and this endorsement?

A. I understood that my brother Will, the lawyer, was to prepare the paper and was to see that it was properly executed.

Q. You had nothing to do with that part of it, except this arrangement?

A. Nothing at all.

Q. The $3,000, note was at the banking house of N. Holmes & Sons?

A. Yes.

Q. It had not matured or at least had not been protested?

A. No sir.

Q. You were an endorser upon that note at that time?

A. Yes, sir.

Q. Did you know anything about whether or not it had matured at that time?

A. I did not, no.

Q. A check then was brought down to your office from your brother Gustave for $3,000?

A. Yes.

Q. What was said and done at that time? Who brought it down? His clerk?

A. His bookkeeper brought it to me, and I asked him what it was for, and he told me to lift the note at N. Holmes & Sons; I said "Why didn't you go right down with it?" He said "The check is made to your order." I says, "I will endorse it, and you go and get it yourself."

Q. Did any part of that three thousand dollar check come into your hands?

A. No.

117 Q. It went down to N. Holmes & Sons?

A. Yes, sir, it was so told me.

Q. Well, at the time you got that check, I wish you would state

whether you had any knowledge at all of any insolvency on the part of Gustave?

A. I had not.

Q. Was he carrying on business?

A. Carrying on business.

Q. Do you know whether he was giving checks to other people in business transactions?

A. I do not know; I wasn't in close touch with his business affairs, and don't know.

Q. Well, you had been lending him other monies, had you not, after that date?

A. Yes, sir.

Q. In July, and up to what dates were they?

A. I have the cancelled checks here. On July 7th 1898, I lent him $200; on the 22nd $100., and on the 29th $1500.

Q. Upon what arrangement, if any, did you advance these monies?

A. These were simply advancements on his vouchers from the city.

Q. On his succeeding vouchers?

A. Yes, sir.

Q. What did he say on the subject?

A. He needed this money to pay his hands as he was going along and I advanced him this money on that account.

118 Q. And he was to apply the coming estimate to refunding it?

A. Yes.

Q. That was the arrangement?

A. Yes, sir.

Q. Well, after you advanced these monies, you got from him a check for how much?

A. $1086.64.

Q. What did you do with that? Did that wipe out these advances?

A. I applied it towards that; and on August 8th,—that was after his trouble, he came and told me that he owed a lot of money to his hands, and I finally consented to let him have the money.

Q. How much?

A. $767.

Q. That you actually gave him too?

A. Yes, sir.

Q. These various advances went into the business?

A. Yes, sir.

Q. And then after he had quit business, you returned out of the money he had given to you, $767 to apply to the laboring people that he didn't have money enough to pay?

A. Yes, sir.

Q. Was there or was there not at any time any arrangement by which you were seeking to get, or did get, or there was an under-

standing that you were to get, any preference in the matter of these payments?

Objected to.

119 Objection overruled.

A. No.

Q. Was there at the time these payments were made or before, any exhibition by Gustave Kaufman of his affairs or books to you?

A. Not to me, no, sir.

Q. At the time this $3,000 check was sent, was there any reason given, connected with his financial affairs?

A. No, sir, as I tell you, his bookkeeper brought that check to me. He didn't bring it to me.

Q. It has been said that this plant that was assigned was all that Gustave Kaufman had. What did you realize from that plant?

A. We realized about $2850.

Q. How much did you receive, and what were the expenses off?

A. There was about $450 of expenses, and we received approximately $3300.

Q. That would leave about $2850?

A. Yes.

Q. What efforts did you make to get the most money for that?

A. Every effort; every possible effort, and believe that for the major part of it we succeeded in getting very nearly the actual value. On some things we even got close to what they originally cost. That was true of the rails, and it was true of the engine, and it was true of the road roller, which was the largest item in it. I went to Coshocton, Ohio, to look up a customer there, after a good deal of correspondence, and got within, I should judge, $100 or $125 of the actual cost of it, and I have every reason to believe that we

120 got everything that it was possible to get for it at the time.

Cross-examination by Mr. CASTLE:

Q. That assignment included practically everything that Gustave Kaufman had, did it not?

A. I don't know, sir.

Q. Well, it was intended to include everything, wasn't it?

A. Not that I know of.

Q. Then you don't know anything about it?

A. I don't know what he had, no, sir, I wasn't in touch with his affairs.

Q. It included his operating plant out there on the boulevard, didn't it?

A. Well, just as it is noted in there.

Q. And he had no other operation anywhere else, had he?

A. Not that I know of.

A. And it included his household furniture?

A. Which that paper states belonged to his wife.

Q. But it included his interest in his household furniture?

A. So it states.

Q. And he had no other household furniture except what was at No. 644 Maryland avenue?

A. I beg your pardon, you are trying to make me say that I know about his affairs,—practically say that; and I don't. I don't know whether he had any other business or whether he had any other house or anything else.

Q. Well, it included his office, didn't it?

121 A. Yes.

Q. He didn't have but the one office? You know that much, at least?

A. Yes.

Q. And that whole thing only brought $2800?

A. Yes.

Q. And that is all the assets that Gustave Kaufman had, is it not?

A. I don't know. It is all that passed into our possession.

Q. All that you could find?

A. All that passed into our possession.

Q. Now, you knew when he took the contract for the Beechwood boulevard, I suppose, in the fall of 1897?

A. Yes.

Q. Did you know how much he was to get for the work which he was to do?

A. Just in an approximate way, I believe he said at the time that he had a contract amounting to eighty or ninety thousand dollars, something like that.

Q. How did you come to know that he was paid by estimates from the city?

A. By the fact that when I advanced this money, he said when he would get in his next estimate, he would pay it back.

Q. That is usually the method you took of inquiring as to when you would get your money back?

A. That was it.

Q. When you had your conversation with Mr. Keeling and your brother in the spring or winter of 1898, you knew at that time

122 that Gustave was indebted to Mr. Keeling?

A. Well, I presume so.

Q. Well, you were told so, weren't you, right there?

A. Well, practically so. Pardon me a moment; I couldn't say absolutely yes to that. Mr. Keeling's testimony was so contrary to my recollection of what transpired there that I wouldn't like to say even yes or no to one thing.

Q. Well, there was such a conference between you and Gustave Kaufman and Mr. Keeling?

A. Yes.

Q. And it was upon the subject of Mr. Kaufman's indebtedness to Mr. Keeling?

A. No, sir.

Q. It was in your office?

A. Yes.

Q. And at your invitation?
A. No, sir.
Q. At whose?
A. My brother Gus'.
Q. How did it come that it took place in your office?
A. I think I can explain that to you.
Q. Well.
A. My brother Gus, it appears, wanted me, or said at the time that he would like me to take charge of paying out and attending to the business end of this contract.

123 Q. Did he say that in this conversation?
A. In that conversation, yes, and I believe that I said I would be willing to do it; although it was out of my line, I was willing to do it; but that was the end of it. I never got one thing into my hands, or so much as a scrap of knowledge about it.
Q. Well, your promise to do that, or your saying you would be willing to do that was the reason for Mr. Keeling's commencing again to furnish your brother stone, was it not?
A. I doubt that very much. I doubt that awfully; I don't believe it.
Q. Well, from your conversation, don't you know as a matter of fact, that at that time Mr. Keeling had quit furnishing your brother stone?
A. No, sir, certainly not.
Q. Didn't Mr. Keeling state at that time that he had?
A. No, sir, he did not. I had no intimation at that time that there was any difference between Mr. Keeling and my brother Gus at all, as to things of that kind.
Q. Didn't you know at that time that Mr. Keeling was pressing your brother for settlement of some claims?
A. No, sir, I did not. I knew from what they told me there that there was a note about due which it was inconvenient for my brother Gus to pay at that time, and that they were trying to make some arrangement by which Mr. Keeling would attend to that and I believe he was talking even of having it transferred to some other bank; I believe that was Mr. Keeling's own suggestion, that

124 he would have it discounted at some other bank; he was doing business, I believe, at the Mercantile bank at that time, and he said he would have it done somewhere else.
Q. Then you learned at that time that your brother couldn't pay that debt at that time?
A. That it was inconvenient to pay it at that time, yes, sir.
Q. And it was in connection with that that your brother Gus or you suggested that you take charge of the financial end?
A. I didn't suggest it. I was asked to do it.
Q. And you promised to do it?
A. I said I would if it was brought to me.
Q. And with that in view, the party dispersed, did they?
A. Yes, I think so.
Q. And then Mr. Keeling went on shipping your brother stone?

A. I don't know. Mr. Keeling certainly didn't go on shipping stone on any promise that I made to him. What he said, that I said I would see that was paid, is an untruth. I said I didn't believe he would ever lose a dollar on Gus. But that is an absolute untruth, which is proven by the fact that he never made any claim on me for what he shipped afterwards; he never brought a bill to me; he never sent a collector to me; he never asked me for a cent of it; not even up to this date.

Q. Well, you didn't make any written application then to pay it, did you?

A. Not either verbal or written.

Q. Well, you didn't make any written one, at least?

A. Certainly not.

125 Q. Now, in August do you remember of being present in your brother's office when Mr. Keeling's bookkeeper came in?

A. I remember him now; I only remember him since I saw him here on the witness stand.

Q. And you remember the conversation between him and Gustave?

A. I don't remember much about it. I believe he testified to what was exactly correct.

Q. Well, you knew at that time that your brother Gustave was in bad financial condition?

A. I don't know that I did, and I don't know when that happened. I believe he said that happened on the 5th of August. Wasn't that his testimony?

Q. Yes.

A. That was after the date that this check was given to me.

Q. That was the next day afterward.

A. Well, it is possible that I might then in that way have learned something about it.

Q. You knew it then?

A. I say it is possible I may have learned it then.

Q. Well, you hadn't known it before?

A. No.

Q. Not even known it on the day before?

A. No.

Q. Did you know how these estimates came? At what time in the month they came? Did you know whether they came once a month or not?

A. I was told that they came once a month, I believe.

Q. By whom?

126 A. I suppose by my brother Gus or some of the other boys, I don't remember.

Q. That was in connection with the discussion of the affairs that you learned that?

A. Yes.

Q. By the way, who was Mr. Gustave Kaufman's bookkeeper at that time?

A. Ben Kaufman, my brother.

Q. I suppose you during this year, the fall of 1897 and 1898, saw your brother Gustave often?

A. Very frequently.

Q. Lived close to him?

A. Very close to him.

Q. Discussed general matters with him?

A. Yes.

Q. Including both your businesses?

A. No, I think not. We are more or less reticent, as a family, with regard to our individual business; I don't think we did.

Q. But you endorsed paper for him from about January on?

A. I don't know the exact dates, but I know I did at different times, odds and ends, the same way that one brother would for another.

WILLIAM KAUFMAN sworn.

Direct examination by Mr. SCHOYER:

Q. You are a member of the bar?

A. Yes, sir.

Q. A brother of the defendant Joseph S. Kaufman?

A. Yes. sir.

127 Q. And also of Gustave?

A. Yes sir.

Q. I turn your attention to Exhibit No. 6 and ask you what you know about the paper and the arrangement and circumstances under which it was given.

A. This paper was drawn by me in May, I think it was May 19th my brothers Joe, Saul, Emanuel, Sydney and I became endorsers on the promissory note for Gus for $6,000., discounted at the Second national bank. At that time it was agreed that Gus should make a collateral assignment of his plant as collateral security for our becoming endorsers on this note. He offered to do so, and we said we would do it, and that he should make this assignment. The matter was left to me to draw up the paper, and I didn't do it right away, I thought there was plaenty of time, I didn't think there was any necessity to have it done, and I suppose I delayed it two or three days, and then I handed it to Gus for him to sign; and in that way it wasn't signed until the date when it was signed, the date of its purport, the 30th day of June 1898; this writing in here "It having been agreed that this assignment is given on the date of the last mentioned endorsement" is in my handwriting and was inserted prior to the signing of the instrument.

Q. At the time that paper was drawn, I wish you would state what was brought to your notice in the presence of your brother Joseph, from Gustave, in regard to his financial condition,—when you endorsed those notes and had that paper provided for.

A. At that time, when he asked us to become endorsers on this

note, his statements to us were that his condition was per-
128 fectly solvent, that he would be able, with this assistance, which we were led to believe was temporary, that this would be an accommodation to him at that time, and that it would help him along at that time to meet current bills and expenses, that it would relieve him; and he stated to us all that he was all right; those were his words; that he was all right; and that *that* he would finish the contract, and he wanted us to make this endorsement for him.

Q. Was there a lease given back?

A. Yes.

Q. That is, a lease to Gustave of this plant?

A. Yes, we leased him the plant on the same date as the date of the assignment, so that he should have it to use in his business of completing the contract.

Q. Do you know anything at all about the subsequent transactions of the three thousand dollar note and checks and that sort of thing?

A. No, sir.

Cross-examination by Mr. CASTLE:

Q. This bill of assignment was made up from a list of stuff furnished you by Gustave?

A. Yes.

Q. I suppose you didn't know at that time whether that included everything he had, or was simply part of what he had, did you?

A. Oh! I didn't know what he had, or whether that was everything he had, or all of his plant or not all of his plant; of
129 course, I didn't know anything about that. I do know that he had other contracts which are not included in this.

Q. Well, there are no contracts in that — all, are there?

A. No.

Q. There is nothing but the plant?

A. Nothing but what is mentioned in there. I don't know; as I tell you, I merely followed the list which he handed to me.

Q. Well, now, at the time that you boys endorsed for him, he admitted to you that he was embarrassed, I suppose, temporarily?

A. He did not.

Q. What did he want the use of the money for?

A. Oh! like any other man who is in business and needs money temporarily. A man isn't embarrassed necessarily because he wants to borrow money. A business man often and often,—and even the biggest concerns are the biggest borrowers. That doesn't show that they are insolvent.

Q. Well, the proposition to give you this collateral security came as an offer from him,—not as a demand from you?

A. We didn't demand it, no, sir.

Q. You would have endorsed just the same without that, would you?

A. Under the circumstances, yes.

Q. When did you take possession of the plant after the wreck?

A. Well, I believe the latter part of the first week in August; I don't know the exact date; but the suit which we brought to recover the plant from Thomas McNally,—we had to bring a suit in replevin,—will show about the date. It was around the
130 tenth or fifteenth of August, I judge, when we began to take possession of the plant.

Q. You remember that your brother quit his work there about the fourth of August, I suppose?

A. I don't know the date, but I know it was later than the 4th of August; I think he quit about the 7th or 8th.

Q. That is your recollection?

A. That is my recollection.

Q. You told us that your brother had other contracts, Do you know what other contracts he had besides this?

A. I know of one other contract he had, which was the building of the Davis Avenue bridge in Allegheny.

Q. Well, that was assigned to your father, wasn't it?

A. That was assigned to my father as collateral security for a note endorsed, and discounted at the Second national bank.

Q. Did you draw that at the same time you did this?

A. I don't know; I can't recollect it.

Re-direct examination by Mr. SCHOYER:

Q. What had you to do with selling this plant out after you got it?

A. With the disposing of it, you mean?

Q. Yes.

A. Why, Joe attended to nearly all of that. I tried to get it for them through the replevin suit, and when I got it safe, he did the selling.

Q. Do you know what the returns were?
131 A. At what price?

Q. Yes, what it realized.

A. No, only what he reported to us that he sold it at, except one item. There was a block, I think, a derrick, a crane and some tackle which was sold by Mr. McNally for $150. I think I arranged that.

Defendant rests.

132 *Oral Charge of the Court.*

MCCLUNG, *J.*:

GENTLEMEN OF THE JURY: The trustee of the bankrupt, Gustave Kaufman, seeks to recover from J. S. Kaufman certain payments that were made in fraud of the bankrupt law. It was not a fraud

morally, leaving the law out of view. But it was a fraud if it was done under the circumstances charged in this case. It was a fraud upon the bankrupt law which would entitle the plaintiff to recover it back. This applies, under the evidence, only to a part of the claim. The claim was for $3000, and $1,086.64. As to the $3,000 you would not be justified in finding that there was a preference here. The money was paid to Holmes & Sons, it appears, under the evidence as submitted here; and even if it relieved the defendant from a liability which would otherwise have rested upon his shoulders, yet he cannot be made liable because the money was paid to another party.

So that the case resolves itself into the consideration of this $1086.64. Was that a preference? In order to find it a preference, you must find that at the time it was paid it was within four months of the party being declared a bankrupt. That part of it is admitted. He went into bankruptcy, I believe, 16 days afterwards. So that if the payment was made at the time, you must find that at the time it was made, Gustave
133 Kaufman was insolvent; and you must find that at the time it was made, J. S. Kaufman received the payment having reasonable cause to believe that it was intended thereby to give a preference. Now, of course, if he knew of the insolvency, knew that his brother was about to fail, he would have reasonable cause to believe that it was intended to give a preference. I suppose that you have no doubt about the insolvency at the time of Gustave Kaufman. The evidence all tends that way, and nobody seems to deny it. He was insolvent a short time afterward, and he practically quit business within a few days after this time; and there was some conversation the next morning which indicates that at that time he knew he was insolvent. And the testimony of the book-keeper is to the effect that the books showed that there was nothing behind him for perhaps a year. So that I take it that that question of the insolvency need not be discussed to any extent. Assuming that that is determined in favor of the insolvency of the party, then the question is, Did this defendant have reasonable cause to believe that by this payment it was intended that he should be preferred. The case will come down to that; and on that question you take into account, of course, all the facts that bear upon it. You take into account the relationship of the parties. In some aspects that would bear upon it one way, and in some aspects of it, another way. You take into account the facts that are shown to have been brought to the attention of the defendant. According to Mr. Keeling, as early as the
134 January before, it appeared that there was some embarrassment, at least, in the matter of getting cash; and that not only has to do with what it indicates with respect to embarrassment, but it shows some intimacy in relation to these parties. If you conclude that Gustave Kaufman was insolvent, and that the defendant here knew all about his affairs, as a matter of course, that would be very strong evidence that he knew that this was intended as a preference.

But you take also in connection with that the facts that occurred in May and June, when he became endorser on certain paper and got another paper as security, a paper which assigned this plant. It appears that this was the only property that he knew of, and he knew that he was incurring an indebtedness then all together of some nine thousand dollars, and they say that this property was well sold at $3300. Did he know, under the circumstances, taking that into account with all other matters and taking all other things into consideration? Did he know that he was insolvent? And therefore did he have reasonable cause to believe that when he paid this $1086.64 to him, that he was paying more to him that he could pay to others,—that is, that he was giving him a preference? That is the case just in a nut shell. It is not a question as to whether he ought to have paid this or not on general principles,—whether he owed it or not. It is assumed that he owed it. But if he paid it, being insolvent, and the other party having reasonable cause to believe that it was intended as a preference, then he is bound to pay it back to the trustee, and simply take his share with the
135 other creditors. That is the question for you to determine. If you believe that it was taken under those circumstances, then the plaintiff is entitled to a verdict.

I am asked to charge with regard to an alleged set-off here. I do not see that there is any evidence which would justify me in saying that there is money that went into the estate of the bankrupt here. There is evidence that he paid some money that seems to have been appropriated to some other debts; but there is nothing which would justify a set-off, as I understand the testimony in the case. So that if you find that there was this preference, and that it was known, or that the defendant had reasonable cause to believe it was a preference, you will find for the amount of that payment.

To which charge of the court counsel for plaintiff and defendant respectively request exceptions. Exceptions allowed and bills sealed.

136 The foregoing notes of testimony with the exceptions taken by counsel during the trial, to the rejection or admission thereof, and the charge, with the exceptions thereto, have been examined by me, and are hereby approved and ordered to be filed.

S. A. McCLUNG, *Judge.*

Endorsement: No. 790 August term 1899. W. T. Tredway, trustee, of estate of Gustave Kaufman, bankrupt, *vs.* J. S. Kaufman. Notes of testimony and charge of court. Filed April 15, 1902.

137 In the Court of Common Pleas No. 3 of the County of Allegheny, Pa.

W. T. TREDWAY, Trustee of Estate of Gustave Kaufman, Bankrupt, versus J. S. KAUFMAN. } No. 790, August Term, 1899.

Verdict.

And now to wit: Jan. 14", 1902, we, the jurors empanelled in the above entitled cause, find for the plaintiff, W. T. Tredway, trustee in the sum of thirteen hundred and nine dol. and ninety four cents $1309.94.

WM. F. KELLER, *Foreman.*

[Endorsed:] No. 790 Aug. term, 1899 W. T. Tredway, tr. *versus* J. S. Kaufman Jury sworn. Verdict. Filed Jan'y 15 1902. A. J. McQuitty, prothonotary.

138 In the Court of Common Pleas No. —, Allegheny Co.

W. T. TREDWAY, Trustee, vs. JOSEPH S. KAUFMAN. } No. 790, August Term, 1899.

And now January 18, 1902, comes the defendant, by attorney S. Schoyer, Jr., and moves the court for rule on the plaintiff to show cause why a new trial should not be granted.

S. SCHOYER, Jr.,
Att'y for Defendant.

Reasons.

First. The court erred in refusing to give binding instructions for the defendant.

Second. The court erred in refusing to charge the jury that defendant was entitled to a credit for the sum of seven hundred sixty seven ($767.00) dollars advanced to the bankrupt on August 8, 1898, as a set off for counter claim to which defendant was entitled under section 60, paragraph C of the bankruptcy act of July 1st, 1898.

Third. The verdict includes interest, and is therefore contrary to the provisions of section 60, paragraph B of the bankruptcy act.

Fourth. The charge of the court did not sufficiently or adequately present the case and the evidence in all its aspects to the jury.

139 Fifth. The verdict is contrary to the law and the weight of the evidence.

Endorsement: No. 790 August term 1899. W. T. Tredway, trustee, *vs.* Joseph S. Kaufman. Motion for a new trial. And now Jan. 18, 1902, rule on plaintiff to show cause why new trial should not be granted. By the court. Filed Jan. 18, 1902. S. Schoyer, Jr., att'y for defendant. H. L. Castle. McClung.

140 W. T. TREDWAY, Trustee, &c., *vs.* J. S. KAUFMAN. } No. 190, August Term, 1899. Motion for a New Trial.

Opinion, McCLUNG, J.:

This is a suit by a trustee in bankruptcy to recover the amount of an alleged preference. As to the larger portion of the claim the jury was instructed to find in favor of defendant. As to a payment of $1086.84 made by the bankrupt to the defendant sixteen days before he filed his petition in bankruptcy, the jury found that it was paid after insolvency (this was admitted) and that defendant had in the language of the bankrupt act, "reasonable cause to believe that it was intended thereby to give a preference." This finding has ample evidence to support it and should not be disturbed.

The only question that now calls for further consideration, is, that which relates to the set off claimed by defendant. Was there evidence in the case which required the submission of this question to the jury? At the time of the trial we thought that there was not, and so instructed the jury.

The bankrupt act provides that: "If a creditor has been preferred, and in good faith gives the debtor further credit without security of any kind for *property which becomes a part of the debtor's estate*, the amount of such new credit remaining unpaid at the time of the adjudication may be *set off* against the amount which would otherwise be recoverable from him."

141 The only testimony which we have on this subject, in the present case is that of the defendant himself which we quote in full.

A. * * * And on August 8th.,* that was after his trouble he came and told me that he owed a lot of money to his hands, and I finally consented to let him have the money.

Q. How much?

A. $767.00.

Q. That you actually gave him too?

A. Yes sir.

Q. These various advances went into the business?

A. Yes sir.

Q. And then after he had quit business you returned out of the money he had given you $767.00 to apply to the laboring people that he didn't have money enough to pay?

A. Yes sir.

---

* Preference August 4th. Petition in bankruptcy Aug. 20/98.

It is perfectly plain that the party who claims the benefit of a set off must assume the burthen of showing that *he gave further credit for property which became a part of the debtor's estate.*

This $767.00 did not literally become a part of the bankrupt's estate.

Evidence that the debtor got the money *for another purpose* certainly *is not* evidence that he turned it over to the trustee.

The most that defendant can ask (and this we would prob-
142 ably hold) is that money shown to have been *given and used to pay a preferred debt* would entitle the defendant to a set off.

Under the bankrupt act "Wages due to workmen, clerks or servants *which have been earned within three months before the date of the commencement of the proceedings not to exceed $300 to each claimant*" are in the *4th class of preferred claims.*

Assume that this money was used to pay labor claims.

There is nothing whatever to show that the amounts paid were earned within three months, nor how much was paid to each claimant nor does it even appear that there is enough in the estate to pay the claims preferred to this 4th. class.

As to this branch of the case defendant stands in the position of a plaintiff seeking to recover, and has not made out a case which entitles him to go to the jury.

New trial refused.

Endorsement: No. 790 August term 1899. Tredway, trustee, *vs.* Kaufman. Opinion, McClung, J. Filed Mar. 22nd., 1902.

143 & 144 PITTSBURGH, *Mar.* 25, 1902.

Received from plaintiff's attorney four dollars, verdict fee, in the case of W. T. Tredway, trustee *vs.* Joseph S. Kaufman being No. 790 August term 1899.

WILLIAM C. McKINLEY, *Sheriff.*

Endorsement: No. 790 August term 1899 W. T. Tredway, trustee *vs.* J. S. Kaufman $1309.94. Filed March 25, 1902.

145 In the Supreme Court of Pennsylvania, Western District, November Term, 1902.

W. T. TREDWAY, Trustee of the Estate of Gustave Kaufman, Bankrupt,
vs.
J. S. KAUFMAN.
} No. —.

Petition for Allowance of an Appeal from Superior Court.

To the honorable the chief justice and justices of the supreme court of Pennsylvania:

The petition of J. S. Kaufman, appellant and defendant in the court below, respectfully prays for the allowance of an appeal from the judgment of the superior court of Pennsylvania in the case of W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, against him, the said J. S Kaufman, appellant, at No. 147 April term 1902 of said superior court and respectfully represents:

That said case involves the construction of the 60th section of an act of Congress approved July 1, 1898, entitled "An act to establish an uniform system of bankruptcy throughout the United States."

That the said superior court in its judgment aforesaid has denied the right of the appellant to a set off, to which he is entitled
146 under said section, and has also so construed the said section as to impose upon your petitioner a liability and interest thereon, which he ought not to be required to pay under the provisions of the said section.

The questions involved in the case are as follows:

"The proper construction of section 60 of the national bankruptcy law relating to preferences:

(1.) As to what constitutes a voidable preference;

(2.) Whether a recovery by the trustee from an alleged preferred creditor should include interest;

(3.) What character of further credit constitutes an allowable set off.

(4.) Under all the evidence in the case should not the court have taken the case from the jury?

Your petitioner annexes hereto a certified copy of the opinion of the superior court in the said cause, and files herewith copies of appellant's paper book, together with a paper book of the appellee.

J. S. KAUFMAN.

S. SCHOYER, JR.,
Att'y for Petitioner.

147 TREDWAY, Trustee, vs. KAUFMAN. } No. 147, April Term, 1902. Appeal Common Pleas No. 3, Allegheny Co. Filed October 13, 1902.

BEAVER, *J.*:

This is an action by the trustee of a bankrupt to recover an amount of money alleged to have been paid to the defendant in violation of the provisions of the sixtieth section of the national bankrupt act. The bankrupt and the defendant were brothers. August 4th 1898 the bankrupt paid the defendant $1086.64. August 8th 1898 the defendant advanced to the bankrupt, at his request, $767.00 for the alleged purpose of meeting a payroll. August 20th 1898 the bankrupt filed his petition for adjudication in bankruptcy and subsequently was duly adjudged and decreed a bankrupt.

Three questions arise, involving the construction or interpretation of three clauses of the 60th section of the bankrupt act of 1898: 1st. Was the payment made August 4th 1898 by the bankrupt to the defendant a preference within the meaning of the act? 2nd. Was the advancement of $767.00 August 8th 1898 a set-off under the provisions of clause (*c*) of said section? 3rd. Did the
148 payment of August 4th 1898, if a preference, bear interest from its date?

The clauses of section 60 of the bankrupt act involved herein are as follows:

"SECTION 60. Preferred creditors.—(*a.*) A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

(*b.*) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefitted thereby, or his agent acting therein shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person.

(*c.*) If a creditor has been preferred and afterwards, in good faith, gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

1. There does not seem to have been much doubt as to the
149 insolvency of the debtor at the time of the payment, August 4th 1898. It was practically conceded. If, therefore, the defendant, the person receiving the payment, "had reasonable cause to believe that it was intended thereby to give a preference," the

right of action would be complete and the trustee would have a right to recover in this case.

The evidence as to the defendant's knowledge of the financial condition of the bankrupt was somewhat detailed and covered a considerable portion of time prior to the alleged preference and the adjudication in bankruptcy. The plaintiff offered testimony of a witness as to an interview had by him with the bankrupt and the defendant in January previous to the adjudication, in regard to the financial condition of the bankrupt, for the purpose of showing (1) the bankrupt condition of Gustave Kaufman and (2) the knowledge of Joseph S. Kaufman of his bankrupt condition. This was objected to and the offer admitted under objection and the admission assigned for error. If the testimony had been of a single transaction over seven months prior to the alleged preference and there had been nothing to show a continuing knowledge by the defendant of the affairs of the bankrupt, the objection might have had some validity as being remote and disconnected from the alleged bankruptcy, but other events tended to show that from that time down to the date of the payment which constituted the alleged preference the defendant had more or less intimate connection with and knowledge of the affairs of the bankrupt, including an assign-
150 ment to him and others of all of the bankrupt's property in May or June of the same year. We think the evidence, under the circumstances, was properly admitted and that it and all the other facts tending to show that the defendant had reasonable cause to believe that the payment to him was intended to give a preference were fairly submitted to the jury. Their finding upon that subject was conclusive and the preference established.

(2.) Was the payment of $767.00 by the defendant to the bankrupt August 8th 1898, a legal set-off, under the terms of clause (c) of section 60 aforesaid? The testimony of the defendant in regard to that is as follows: "Q. Well, after you advanced these moneys, you got from him a check for how much? A. $1086.64. Q. What did you do with that? Did that wipe out these advances? A. I applied it toward that and on August 8th—that was after his trouble—he came and told me that he owed a lot of money to his hands and I finally consented to let him have the money. Q. How much? A. $767.00. Q. That you actually gave him too? A. Yes, sir. Q. These various advances went into the business? A. Yes, sir. Q. And then after he had quit business, you returned out of the money he had given to you $767.00 to apply to the laboring people that he didn't have money enough to pay? A. Yes, sir. Q. Was there or was there not any arrangement by which you were seeking to get or did get or was there an understanding that you were to get any preference in the matter of these payments? A. No." In order to entitle the defendant to successfully set-off the payment
151 of $767.00 against the money received by him, it was necessary for him to show that the amount which he sought to set off had become a part of the debtor's estate. Does this testimony show it? We cannot see that it does. The money was advanced for the ex-

ress purpose of making certain specific payments. Whether it was pplied or not does not appear. If the money had been applied to referred claims under the act and the amount for distribution by ie trustee had been thereby increased, the estate of the bankrupt ould have been to that extent indirectly benefitted, but this does ot appear, and it seems to us that it was necessary for the defend- nt to show specifically that the payment became "a part of the ebtor's estates," in order to entitle him to use it as a set-off. This as not shown and we cannot, therefore, convict the court of error refusing to say to the jury that the set-off was established. The ourt below, in the opinion refusing a new trial, said: "This 767.00 did not literally become a part of the bankrupt's estate. vidence that the debtor got the money for another purpose cer- inly is not evidence that he turned it over to the trustee. The ost that defendant can ask—and this we would probably hold—is at money shown to have been given and used to pay a preferred ebt would entitle the defendant to a set-off." It would, of course, ot be necessary to show distinctly that the money was turned over the trustee but it was necessary to show that the estate was bene- tted in some way by the payment. This was not shown clearly; indeed it does not affirmatively appear that the estate was in 52 any way benefitted directly or indirectly. The first assign- ment, therefore, is over-ruled.

3. There remains the question of interest. There seems to have een nothing said upon the subject at the trial. The court directed ie jury, in case they found that there had been a preference, to find r the amount of the payment. The plaintiff admits that interest ould not be charged until demand made and, as no demand was own until suit brought, interest would be payable only from the ate of the suit. There should, therefore, be a deduction, as of the ate of the verdict, of $63.45. Let this be deducted from the judg- ent as of January 15th 1902, and with this correction let the judg- ent be affirmed.

53 Endorsement: No. 147 April term 1902. Tredway, trus- tee *vs.* J. S. Kaufman. Petition for allowance of appeal from dgment of superior court of Pennsylvania, *Ex parte* J. S. Kaufman, ppellant and defendant below. October 24, 1902. Appeal re- ised. *Per cur.* Filed Oct. 23, 1902. Supreme court W. D. S. choyer, Jr.

54 *Assignments of Error.*

First. The court erred in charging the jury as follows:

"I am asked to charge with regard to an alleged set off here. I do not see that there is any evidence which would justify me in saying that there is money which went into the estate of the bank- rupt here. There is evidence that he paid some money that seems o have been appropriated to some other debts, but there is nothing

"which would justify a set off as I understand the testimony in the "case, so that if you find that there was this preference, and that it "was known or that the defendant had reasonable cause to believe "it was a preference you will find for the amount of that payment."

Second. The court erred in refusing the defendant's last point which point and the answer thereto were as follows:

"Under all the evidence the verdict must be for the defendant."

Answer: "Refused."

Third. The court erred in admitting evidence under the following offer, which offer, the objection thereto, and the ruling thereon were as follows:

"By Mr. CASTLE: I propose to prove by the witness on the stand "that in January, 1898, Gustave Kaufman then being indebted to "him in quite a large sum of money, and his notes having gone to "protest, that he declined to sell any more stone to Gustave Kauf-
"man, whereupon he was telephoned for to go to the office of
155 "Joseph S. Kaufman, in the Times building, city of Pittsburgh,
"where he met Joseph S. Kaufman and Gustave Kaufman, "and there discussed the financial condition of Gustave Kaufman "with both Gustave Kaufman and Joseph S. Kaufman, the defend- "ant here; and that Joseph S. Kaufman there told him that Gustave "Kaufman was not a good financier, and that he was in a bad state "financially, and that he, Joseph S. Kaufman, was going to take "charge of his affairs, and assured the witness that if he would con- "tinue to ship stone to him he would see that it was paid, whereupon "witness continued to ship stone until the month of June, accepting "promissory notes for the same upon the express promise of Joseph "S. Kaufman that he would see that they were paid; this for the "purpose of showing: first, the bankrupt condition of Gustave "Kaufman, and second, the knowledge of Joseph S. Kaufman of "his bankrupt condition."

"By Mr. SCHOYER: That is objected to as irrelevant and immate- "rial. It is too remote. It has nothing to do with the question of "whether or not on the 4th of August, Joseph S. Kaufman had "reasonable cause to believe that at that time Gustave Kaufman was "bankrupt, and that the money that he was then receiving was "preferential within the meaning of the act."

"Objection overruled. To which ruling counsel for defendant "requests an exception, which exception was allowed and bill "sealed."

The testimony given by the witness, Joseph Keeling, under the above offer, will be found at page 22 *et seq.* of appendix.

Fourth. The court erred in allowing interest on the amount of the alleged preference from August 4, 1898, to be included in the amount of the verdict.

156–185 *Statement of Questions Involved.*

The proper construction of section 60 of the national bankruptcy law relating to preferences:

(1.) As to what constitutes a voidable preference.

(2.) Whether a recovery by the trustee from an alleged preferred creditor should include interest.

(3.) What character of further credit constitutes an allowable set off.

(4.) Under all the evidence in the case should not the court have taken the case from the jury.

186 In the Supreme Court of Pennsylvania, Western District.

W. T. TREDWAY, Trustee of the Estate of Gustave Kaufman, Bankrupt,
vs.
JOSEPH S. KAUFMAN, Appellant.
} No. —, October Term, 190-.

Motion for Reconsideration of Order Refusing Appeal.

To the honorable the chief justice and justices of the supreme court of Pennsylvania:

And now November 3, 1902, comes Joseph S. Kaufman, the appellant above named by counsel Jos. A. Langfitt and Wm. Kaufman, and moves for a reconsideration of the order of this court entered October 24, 1902, refusing an appeal to this court from the judgment of the superior court *at* No. 147 April term, 1902.

J. A. LANGFITT.
WM. KAUFMAN.

187 *Reasons.*

First. Section 7 of the act of assembly of Pennsylvania, approved June 24, 1895, P. L. 212, (the superior court act), provides (*inter alia*) as follows:

"Nevertheless in any action or proceedings whatever above committed to the final and exclusive decision of the said (superior) court, there may still be an appeal from its judgment to the supreme court:

"First. If the jurisdiction of the superior court is in issue; or

"Second. If the case involves the construction or application of the Constitution of the United States, or of any statute or treaty of the United States; or

"Third. If the case involves the construction or application of the constitution of Pennsylvania; or

"Fourth. If the appeal to the supreme court be specially allowed

by the superior court itself, or any one justice of the supreme court."

This case, as the record clearly discloses, and, as is stated in the "petition for allowance of an appeal from the superior court," heretofore filed by the appellant, involves the construction and application of a statute of the United States, towit, the act of Congress, approved July 1, 1898, entitled, "An act to establish a uniform system of bankruptcy throughout the United States."

188 Counsel for appellant submit, therefore, that under the plain and unambiguous terms of the act of 1895, above cited, he is entitled as a matter of right, to take an appeal from the said judgment of the superior court to this court; that it is not within the discretion of the supreme court whether or not to allow the appeal, but that it should be allowed as a matter of course.

Second. Section 709 of the Revised Statutes of the United States (citing and referring to the acts of Congress of Feb. 5, 1867, c. 28, s. 2, v. 14, p. 386; Sept. 24, 1789, c. 20, s. 25, v. 1, p. 95; and Feb. 18, 1875, c. 80, v. 18, p. 318) is as follows

"*A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had,* where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of their validity; *or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed, by either party, under such Constitu-*

189 *tion, treaty, statute, commission or authority,*—may be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; (and the proceedings upon the reversal shall be the same, except that the Supreme Court may at their discretion, proceed to a final decision of the case and award execution, or remand the same to the court from which it was so removed.)

"The Supreme Court may (reaffirm) reverse, modify or affirm the judgment or decree of such State court and may, at their discretion, award execution or remand the same to the court from which it was removed by the writ."

The appellant, throughout the entire course of this suit, in his affidavit of defense, at the trial and in his appeal to the superior court, has claimed, and still does claim: (1) that he is not liable at all to the plaintiff under the bankruptcy act, the act of Congress first above referred to; and (2) that he is entitled to a set off to the claim of the plaintiff under clause (c) of sec. 60 of the said bankruptcy act.

Since these are claims for rights, privileges and immunities under a statute of the United States and the decision against the said

claims the appellant becomes of right entitled to an appeal to the Supreme Court of the United States from "the final judgment or decree in the highest court of this State in which a decision
190 in the suit can be had," under and by virtue of the provisions of said section 709 of the Revised Statutes of the United States.

If this honorable court shall decide to refuse to allow an appeal from the superior court, notwithstanding the reasons herein advanced, then counsel for appellant respectfully request your honors to state on record that, in its opinion, the judgment of the superior court rendered in this case at No. 147 April term, 1902, is final and conclusive, and that its judgment is "the final judgment or decree in this suit in the highest court of this State in which a decision in this suit can be had," or make such other record of the proceedings as will enable the appellant, if he sees fit, to take his appeal to the Supreme Court of the United States.

J. S. KAUFMAN.

COMMONWEALTH OF PENNSYLVANIA, } *ss:*
County of Allegheny, }

Joseph S. Kaufman, appellant above named, being duly sworn according to law, deposes and says, that the averments contained in the foregoing "reasons" are true; and this motion for reconsideration is not interposed for the purpose of delay.

J. S. KAUFMAN.

Sworn to and subscribed before me this 1st day of November, 1902.

GEORGE PEARSON, *Pro.*

191 Endorsement: Supreme court western district. No. —. October term 1902. W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, *vs.* Joseph S. Kaufman, appellant. Motion for reconsideration of order refusing appeal. Filed Nov. 3, 1902. Supreme court W. D. Nov. 11, 1902. Motion refused. *Per curiam.* Joseph A. Langfitt and William Kaufman att'ys for appellant.

192 THE SUPERIOR COURT OF PENNSYLVANIA, } *ss:*
County of Allegheny, }

The Commonwealth of Pennsylvania to the judges of the court of common pleas No. — for the county of Allegheny, Greeting:

We being willing for certain causes, to be certified of the matter of the appeal of Joseph S. Kaufman from the judgment of your said court, at No. 790 of August term, A. D. 1899 wherein W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, is plaintiff and said appellant is defendant before you, or some of you, depending,

do command you, that the record and proceedings aforesaid, with all things touching the same, before the judges of our superior court of Pennsylvania, at a superior court to be holden at Pittsburgh, the 1st Monday of May next, so full and entire as in your court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable Charles E. Rice, doctor of laws, president judge of our said superior court at Pittsburgh, the 11" day of April in the year of our Lord one thousand nine hundred and two.

[Seal of the Superior Court of Pennsylvania, 1895.]

GEORGE PEARSON,
Prothonotary.

193 To the honorable the judges of the superior court of the Commonwealth of Pennsylvania, sitting at Pittsburgh:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

S. A. McCLUNG. [L. S.]
—— ——. [L. S.]

[Endorsed:] No. 790 Aug. term 1899 No. 147 of April term 1902 superior court W. T. Tredway, trustee *vs.* Joseph S. Kaufman, appellant. Certiorari to the court of common pleas, No. 3 for the county of Allegheny Returnable the 1st Monday of May A. D. 1902 Rule on the appellee, to appear and plead on the return-day of the writ. George Pearson, prothonotary. Filed May 2, 1902 Superior court I. Schoyer, Jr. attorneys for appellant. Filed April 11, 1902

194 In the Supreme Court of the United States.

JOSEPH S. KAUFMAN, Plaintiff in Error,
vs.
W. T. TREDWAY, Trustee of the Estate of Gustave Kaufman, Bankrupt, Defendant in Error. } No. —, —— Term, 190–.

Petition for Writ of Error to the Superior Court of Pennsylvania.

To the honorable the chief justice and justices of the above-named court:

The petition of Joseph S. Kaufman, the plaintiff in error, respectfully represents:

First. This suit was instituted against your petitioner by the said W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, in the court of common pleas No. 3 of Allegheny county, Pennsyl-

vania, at 790 August term, 1899, to recover the sum of $4086.64 alleged to have been paid by the said bankrupt to your petitioner on August 4, 1898, in two payments, one of $3000, and the other of $1086.64. The said trustee claimed that the said payments were made by the bankrupt and received by your petitioner as
195 preferences, in violation of the provisions of section 60 of the act of Congress approved July 1st, 1898, entitled "An act to establish a uniform system of bankruptcy throughout the United States;" and based his right of action against your petitioner upon the said section; all of which will more fully and at large appear by referring to the certified copy of the record and of the plaintiff's statement and affidavit of claim therein contained, which are herewith submitted.

Second. Your petitioner interposed an affidavit of defense to the said statement and affidavit of claim, in which he denied that he had received the said payments as intended preferences, or that he had been guilty of any fraud upon or any other violation of the said act of Congress as alleged and claimed by the plaintiff in his statement and affidavit of claim; he admitted that he had received the payments, but averred that they were received by him in good faith and without knowledge or reasonable cause to believe that they were intended as preferences; he, also, claimed that after receiving the said payments from the said bankrupt, to wit: on August 8th, 1899, he had advanced to him the sum of $767 which he claimed constituted a set-off to the demand of the plaintiff, under and by virtue of the provisions of clause (c) of section 60 of the said bankruptcy act; all of which will more fully and at large appear by referring to the affidavit of defense contained in the certified copy of the record herewith submitted.

196 *Third.* The cause was tried before a court and jury on January 14 and 15, 1902. At the trial the plaintiff based his claim upon the provisions of section 60 of the said bankruptcy act, and the defendant defended thereto along the lines set up in his affidavit of defense, to wit: denying that he had received preferences, and claiming the set-off of $767 under clause (c) of section 60 of the said act. The trial court refused the points put by the defendant, requesting him to give binding instructions for the defendant, and also requesting him to instruct the jury to find that the defendant was entitled to the set-off claimed by him. Whereupon, after being charged by the court, the jury, on January 15, 1902, rendered a verdict against your petitioner in the sum of $1309.94, the same being the amount of one of the payments, to wit: $1086.64, made by the bankrupt to your petitioner on August 4, 1898, with interest thereon from the date of payment to the date of the verdict, thus denying to your petitioner his claims that the said payment did not constitute a preference as defined by the bankruptcy act, and that he was entitled to a set-off for the sum of $767 paid by him to the said bankrupt on August 8, 1898.

As to the remainder of the plaintiff's claim, to wit, the $3000 payment, the court decided that the said payment did not constitute a

preference, and as to it, instructed the jury to find for your petitioner, and the jury found accordingly.

197 On January 18, 1902, a motion for a new trial was filed for reasons consistent with the defenses theretofore interposed; but, on March 22, 1902, the court, in an opinion filed, refused to grant a new trial; and, on March 25, 1902, judgment was entered on the verdict; all of which will more fully and at large appear by referring to the certified copy of the record herewith submitted.

Fourth. Your petitioner thereupon appealed to the superior court of Pennsylvania, at No. 147 April term, 1902; and that court, on October 13, 1902, affirmed the judgment of the court below with a slight correction as to the amount on account of interest. The case is reported in 21 Pa. Sup. Ct. Rep., p. 258. The said court, by affirming the judgment of the court below, denied to your petitioner his claims that the payment received by him did not constitute a preference, and that he was entitled to the set-off for $767 under clause (c) of section 60 of the bankruptcy act; all of which will more fully and at large appear by referring to the certified copy of the record herewith submitted, including the opinion of the said superior court.

Fifth. Your petitioner thereupon, on October 23, 1902, presented his petition to the supreme court of Pennsylvania, praying for the allowance of an appeal from the said judgment of the superior court, basing the same upon section 7 of the act of assembly of Pennsylvania, approved June 24, 1895, P. L. 212. The supreme court of Pennsylvania, on October 24, 1902, refused the appeal *per*

198 *curiam*. On November 3, 1902, your petitioner, by counsel, presented a motion to the said supreme court of Pennsylvania, asking for a re-consideration of the said order refusing the appeal; and, on November 11, 1902, the said motion was dismissed *per curiam*. The supreme court of Pennsylvania, has, therefore, as your petitioner is advised and believes, decided that the superior court is the highest court of Pennsylvania in which a decision in this suit can be had.

Sixth. Your petitioner further represents that there is a Federal question involved in this suit, in that the claim of the plaintiff is specifically based upon a right of action created by an act of Congress, to wit: the act of Congress of July 1, 1898, known as the bankruptcy act. Your petitioner defended the suit, first, by denying that he had received the preferences alleged and claimed by the plaintiff in his statement and affidavit of claim; and, secondly, by setting up and claiming a right, title, privilege or immunity under the said Federal statute, to wit: a set-off of $767, which he advanced to the bankrupt as a further credit without security, after having received the payment from the bankrupt which the plaintiff claimed was a preference. These claims, rights, privileges and immunities have been denied by the lower court and by the superior court of Pennsylvania, the latter court, as the supreme court of Pennsylvania has decided, being the highest court of Pennsylvania in which a decision in this suit can be had.

99 Your petitioner has been advised, and therefore represents that, by virtue of the provisions of section 709 of the Revised Statutes of the United States, he is now entitled to appeal to the Supreme Court of the United States and to a writ of error to be directed from this court to the said superior court of Pennsylvania.

Your petitioner, therefore, prays this honorable court to order a writ of error to issue from this court, directed to the superior court of Pennsylvania, commanding the judges thereof to send the record and proceedings aforesaid, and all things concerning the same, to the Supreme Court of the United States at Washington, that the record and proceedings aforesaid, being inspected, your honors may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

And he will ever pray, etc.

JOSEPH S. KAUFMAN, *Petitioner.*

JOS. A. LANGFITT,
WM. KAUFMAN,
Attorneys for Petitioner.

COMMONWEALTH OF PENNSYLVANIA, } ss:
County of Allegheny, }

Jos. S. Kaufman, being duly sworn according to law, deposes and says that the averments contained in the foregoing petition are true, to the best of his knowledge and belief; and that the writ of
00 error prayed for is not intended for delay.

JOSEPH S. KAUFMAN.

Sworn to and subscribed before me this 18th day of December, 1902.

[Seal of William C. Gill, Notary Public, Pittsburgh, Pa.]

WM. C. GILL,
Notary Public.

My commission expires Mar. 7, 1903.

01 [Endorsed:] In the Supreme Court of the United States. No. — —— term, 190–. Joseph S. Kaufman, plaintiff in error, *vs.* W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, defendant in error. Petition for writ of error to the superior court of Pennsylvania. And now, to wit, December twenty ninth, A. D. 1902, a writ of error to the superior court of Pennsylvania, is hereby *allowed.* George Shiras Jr., associate justice of the Supreme Court of the United States. Jos. A. Langfitt, William Kaufman, attorney- at law, Pittsburgh, Pa., att'ys for plaintiff in error.

202 In the Supreme Court of the United States, —— Term, 190-.

JOSEPH S. KAUFMAN, Plaintiff in Error,
vs.
W. T. TREDWAY, Trustee of the Estate of Gustave Kaufman, Bankrupt, Defendant in Error. } No. —.

Assignments of Error.

First. The superior court of Pennsylvania erred in entering judgment against the plaintiff in error, and thereby affirming the judgment of the court below.

Second. The superior court of Pennsylvania erred in not entering judgment in favor of the plaintiff in error, and in not reversing the judgment of the court below.

Third. The superior court of Pennsylvania erred in refusing to allow to the plaintiff in error his claim that, under clause (*c*) of section 60 of the act of Congress of July 1, 1898, known as the bankruptcy act, he was entitled to a set-off to the claim of the defendant in error, amounting to $767.

203 *Fourth.* The superior court of Pennsylvania erred in finding that the plaintiff in error received a preference from the bankrupt as defined by section 60 of the said bankruptcy act when he was paid by the bankrupt the sum of $1086.64 on August 4, 1898, and in holding him liable therefor to the defendant in error for the amount of the said payment.

Fifth. The superior court of Pennsylvania erred in its opinion as follows:

"The evidence as to the defendant's knowledge of the financial condition of the bankrupt was somewhat detailed and covered a considerable portion of time prior to the alleged preference and the adjudication in bankruptcy. The plaintiff offered testimony of a witness as to an interview had by him with the bankrupt and the defendant, in January, previous to the adjudication in regard to the financial condition of the bankrupt, for the purpose of showing (1) the bankrupt condition of Gustave Kaufman, and (2) the knowledge of Joseph S. Kaufman of his bankrupt condition. This was objected to and the offer admitted under objection and the admission assigned for error. If the testimony had been of a single transaction over seven months prior to the alleged preference, and there had been nothing to show a continuing knowledge by the defendant of the affairs of the bankrupt, the objection might have had some

204 validity as being remote and disconnected from the alleged bankruptcy, but other events tended to show that from that time down to the date of the payment, which constitutes the alleged preference, the defendant had more or less intimate connection with and knowledge of the affairs of the bankrupt, including an assignment to him and others of all the bankrupt's property in May or

June of the same year. We think the evidence, under the circumstances, was properly admitted, and that it and all the other facts tending to show that the defendant had reasonable cause to believe that the payment to him was intended to give a preference were fairly submitted to the jury. Their finding upon that subject was conclusive and the preference was established."

Sixth. The superior court of Pennsylvania erred in its opinion as follows:

"In order to entitle the defendant to successfully set off the payment of $767 against the money received by him, it was necessary for him to show that the amount he sought to set off had become a part of the debtor's estate. Does this testimony show it? We cannot see that it does. The money was advanced for the express purpose of making certain specific payments. Whether it was applied or not does not appear. If the money had been applied to
205 preferred claims under the act and the amount for distribution by the trustee had been thereby increased, the estate of the bankrupt would have been to that extent indirectly benefited, but this does not appear, and it seems to us that it was necessary for the defendant to show specifically that the payment became 'a part of the debtor's estate,' in order to entitle him to use it as a set-off. This was not shown, and we cannot, therefore, convict the court of error in refusing to say to the jury that the set-off was established. The court below, in the opinion refusing a new trial, said: 'This $767 did not literally become a part of the bankrupt's estate. Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee. The most that defendant can ask,—and this we would probably hold,—is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a set-off.' It would, of course, not be necessary to show distinctly that the money was turned over to the trustee, but it was necessary to show that the estate was benefited in some way by the payment. This was not shown clearly; indeed, it does not affirmatively appear that the estate was in any way benefited directly or indirectly. The first assignment, therefore, is overruled."

205*a* *Seventh.* The superior court erred in holding the plaintiff in error liable to the defendant in error for interest in any amount whatsoever.

JOS. A. LANGFITT,
WM. KAUFMAN,
Att'ys for Pl'ff in Error.

Pittsburg, Pa. Dec. 26, 1902.

206 [Endorsed:] In the Supreme Court of the United States. No. —. —— term, 190–. Joseph S. Kaufman, plaintiff in error, vs. W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, defendant in error. Assignments of error. Jos. A. Langfitt, William Kaufman, attorney-at law, Pittsburgh, Pa., att'ys for plaintiff in error.

207 UNITED STATES OF AMERICA, *ss:*

To W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the superior court of the State of Pennsylvania wherein Joseph S. Kaufman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 29th day of December, in the year of our Lord one thousand nine hundred and two.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

208 On this 5th day of January, in the year of our Lord one thousand nine hundred and three (1903), personally appeared W. J. Morris before me, the subscriber, the prothonotary of the superior court of Pennsylvania and makes oath that he delivered a true copy of the within citation to W. T. Tredway personally this day — 11 o'clock a. m.

W. J. MORRIS.

Sworn to and subscribed the 5" day of January, A. D. 1903.

[Seal of the Superior Court of Pennsylvania, 1895.]

GEO. PEARSON,
Prothonotary Superior Court, Sitting at Pittsburg, Pa.

[Endorsed:] Supreme Court, United States No. — ——term, 190- Joseph S. Kaufman plaintiff in error *vs.* W. T. Tredway, trustee etc. Citation. Filed, Jan. 5 1903 Superior court, fifth district. Geo. Pearson prothonotary

209 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the superior court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between

Joseph S. Kaufman, appellant, and W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause
210 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of December, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

211 [Endorsed:] Supreme Court of the United States. No.—. —— term, 190–. Joseph S. Kaufman, plaintiff in error, *vs.* W. T. Tredway, trustee of estate of Gustave Kaufman, bankrupt. Writ of error to superior court of Pennsylvania. Filed Jan. 5, 1903. Superior court, fifth district. Geo. Pearson, prothonotary.

To the honorable the justices of the Supreme Court of the United States:

The record and process and all things touching the same so full and entire as in the superior court they remain, I certify and send as within I am commanded.

[Seal of the Superior Court of Pennsylvania, 1895.]

GEO. PEARSON,
Prothonotary Superior Court, Sitting at Pittsburg, Pa.

212 Know all men by these presents, that we, Joseph S. Kaufman, of Pittsburg, Allegheny Co., Pennsylvania, as principal, and S. D. Strasburger, of the same place, as sureties, are held and firmly bound unto W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, in the full and just sum of two thousand eight hundred (2800) dollars, to be paid to the said W. T. Tredway, trustee as aforesaid, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18" day of December, in the year of our Lord one thousand nine hundred and two (1902).

Whereas, lately at a superior court of the State of Pennsylvania in a suit depending in said court, between the said W. T. Tredway, trustee of the estate of Gustave Kaufman, plaintiff & appellee; and the said Joseph S. Kaufman, defendant and appellant, a judgment was rendered against the said Joseph S. Kaufman and the said Joseph S. Kaufman having obtained writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said Joseph S. Kaufman shall prosecute writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH S. KAUFMAN. [SEAL.]
S. D. STRASBURGER. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
WM. KAUFMAN.

Approved by—
GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

213 [Endorsed:] In the Supreme Court United States No. —— term, 190– Joseph S. Kaufman plaintiff in error vs. W. T. Tredway, trustee of estate of Gustave Kaufman, bankrupt defendant in error Bond for writ of error to superior court of Pennsylvania, at No. 147 April term, 1902.

214 COMMONWEALTH OF PENNSYLVANIA, } *sct:*
County of Allegheny, }

I, George Pearson, prothonotary of the superior court of Pennsylvania, sitting at Pittsburgh, the said court being a court of record, do hereby certify that the foregoing is a true and correct copy of the

whole and entire bond in the case of Joseph S. Kaufman, plaintiff in error, *vs.* W. T. Tredway, trustee of estate of Gustave Kaufman, bankrupt, defendant in error at No. 147 of April term, 1902, as full, entire and complete as the same remains on file in the said superior court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the prothonotary of said court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, in the county of Allegheny, this tenth day of January in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court of Pennsylvania, 1895.]

GEORGE PEARSON,
Prothonotary.

215 [Endorsed:] No. 147 April term, 1902 Joseph S. Kaufman plaintiff in error *vs.* W. T. Tredway, trustee of estate of Gustave Kaufman, bankrupt, defendant in error. Exemplification.

216 In the Supreme Court of the United States.

KAUFMAN, Plaintiff in Error,
vs.
TREDWAY, Trustee, Defendant in Error. } No. 187, October Term, 1903.

To James H. McKenney, Esq., clerk:

We hereby stipulate and agree that the following pages of the record in the above noted case need not be printed, and that the remainder of the record shall stand as and for a full and complete record in this case. We hereby specify the following pages not to be printed:

First. Page 11, being notice to attorneys for defendant to file affidavit of defense.

Second. Pages 20 and 21, being rule to show cause why judgment should not be entered for want of sufficient affidavit of defense, and notice thereof to defendant's attorneys.

Third. Page 25, being a paper marked "verdict," and showing that, on December 14, 1900, a juror was withdrawn and the cause continued.

Fourth. Pages 26 to 73, both inclusive, being: (*a*) Motion of defendant, September —, 1901, for rule to show cause why case
217 should not be stricken off the trial list; (*b*) affidavit of William Kaufman and (*c*) affidavit of Gustave Kaufman, in support thereof; (*d*) answer of trustee; (*e*) rule *ex parte* defendant to

take depositions; (*f*) notice to attorney for plaintiff; (*g*) depositions and exhibit.

Fifth. Page 144 headed "*Excerpts* from paper book."

Sixth. Pages 157 and 158 marked "History of the case."

Seventh. Pages 159 to 176, both inclusive, headed "Argument for appellant."

Eighth. Pages 177 to 189, both inclusive, headed "Argument for appellee."

J. A. LANGFITT,
WM. KAUFMAN,
Attorneys for Plaintiff in Error.
WILLIAM A. STONE,
Attorney for Defendant in Error.
H. L. CASTLE,
Att'y for D'f't in Error.

Pittsburg, Pa., June 26, 1903.

218 [Endorsed:] No. 187. October term, 1903. 18780. Kaufman, plaintiff in error, *vs.* Tredway, trustee, defendant in error. Stipulation of counsel. Jos. A. Langfitt, William Kaufman, attorneys for pl't'f in error, Pittsburgh, Pa.

219 [Endorsed:] File No. 18,780. Supreme Court U. S. October term, 1903. Term No. 187. Joseph S. Kaufman, pl'ff in error, *vs.* W. T. Tredway, trustee, &c. Stipulation to omit parts of record in printing. Filed Oct. 2, 1903.

Endorsed on cover: File No. 18,780. Pennsylvania superior court. Term No. 187. Joseph S. Kaufman, plaintiff in error, *vs.* W. T. Tredway, trustee of the estate of Gustave Kaufman, bankrupt. Filed January 12, 1903. File No. 18,780.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 187.

JOSEPH S. KAUFMAN, PLAINTIFF IN ERROR,

vs.

W. T. TREDWAY, TRUSTEE OF THE ESTATE OF GUSTAVE KAUFMAN, BANKRUPT.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE AND QUESTIONS INVOLVED.

On the 20th day of August, 1898, Gustave Kaufman filed his petition for adjudication in bankruptcy, and in due course was so adjudged. Prior to this date he had been engaged in the business of contracting, and for about a year previously his principal job or work was a subcontract for the paving of a boulevard in the city of Pittsburg amounting to some $90,000, for which he was paid on monthly estimates of work done, approved by the city authorities. He suspended operations on the 7th or 8th of August, 1898, and did not resume.

To carry on his operations he had borrowed money from time to time, and in July preceding had applied to J. S. Kaufman, his brother, living in the same city, but having no business connections or relations with him, for advances on his next estimate expected between the 2d and 6th of August.

J. S. Kaufman accordingly advanced to him July 7 $200, July 22 $100, and July 29 $1,500, making total advances of $1,800 on his promise to repay the same out of his next estimate.

On August 4 Gustave Kaufman received his estimate and returned to J. S. Kaufman therefrom on account $1,086.64. Four days later he, being then in financial straits, came back to J. S. Kaufman and asked a return of $767 of the $1,086.64 last paid, with which to pay wages due laborers on his work or contract. Said sum was given him as requested.

Suit was brought by trustee of the bankrupt to recover *inter alia* the whole of the amount given on August 4 to the appellant, on the ground that the appellant, at the time he received the same, had reasonable cause to believe that Gustave Kaufman was a bankrupt, and that appellant was receiving a preference thereby, in violation of the provision of the bankruptcy act relating to preferences.

A verdict was rendered against appellant for $1,309.94, being the amount of said claim with interest to date of verdict, and, after new trial refused, judgment was entered on the verdict, which judgment the Superior Court of Pennsylvania affirmed, first striking off a part of the interest allowance, by which said verdict was reduced to $1,246.49. From this ruling the plaintiff in error appeals.

There are three questions involved in this controversy:

(1.) Was the payment of $1,086.64 made August 4, 1898, by the debtor to the plaintiff in error a voidable preference

within the meaning of the 60th section of the bankrupt act of 1898?

(2.) Was the plaintiff in error entitled to set off the $767 returned by him to debtor on August 8, 1898, under clause (c) of said section?

(3.) Was interest chargeable in any event on payment of August 4, 1898?

If the first question be decided in the negative, such decision will render the second and third questions unimportant.

ASSIGNMENTS OF ERROR.

First. The Superior Court of Pennsylvania erred in entering judgment against the plaintiff in error, and thereby affirming the judgment of the court below.

Second. The Superior Court of Pennsylvania erred in not entering judgment in favor of the plaintiff in error and in not reversing the judgment of the court below.

Third. The Superior Court of Pennsylvania erred in refusing to allow to the plaintiff in error his claim that, under clause (c) of section 60 of the act of Congress of July 1, 1898, known as the bankruptcy act, he was entitled to a set-off to the claim of the defendant in error amounting to $767.

Fourth. The Superior Court of Pennsylvania erred in finding that the plaintiff in error received a preference from the bankrupt as defined by section 60 of the said bankruptcy act when he was paid by the bankrupt the sum of $1,086.64 on August 4, 1898, and in holding him liable therefor to the defendant in error for the amount of the said payment.

Fifth. The Superior Court of Pennsylvania erred in its opinion as follows:

> "The evidence as to the defendant's knowledge of the financial condition of the bankrupt was somewhat detailed and covered a considerable portion of time prior to the alleged preference and the adjudication in bankruptcy. The plaintiff offered testimony of a witness as to an interview had by him with the bankrupt and the defendant, in January, previous to the adjudication in regard to the financial condition of the bankrupt, for the purpose of showing (1) the bankrupt condition of Gustave Kaufman, and (2) the knowledge of Joseph S. Kaufman of his bankrupt condition. This was objected to and the offer admitted under objection and the admission assigned for error. If the testimony had been of a single transaction over seven months prior to the alleged preference, and there had been nothing to show a continuing knowledge by the defendant of the affairs of the bankrupt, the objection might have had some validity as being remote and disconnected from the alleged bankruptcy, but other events tended to show that from that time down to the date of the payment, which constitutes the alleged preference, the defendant had more or less intimate connection with and knowledge of the affairs of the bankrupt, including an assignment to him and others of all the bankrupt's property in May or June of the same year. We think the evidence, under the circumstances, was properly admitted, and that it and all the other facts tending to show that the defendant had reasonable cause to believe that the payment to him was intended to give a preference were fairly submitted to the jury. Their finding upon that subject was conclusive and the preference was established."

Sixth. The Superior Court of Pennsylvania erred in its opinion as follows:

> "In order to entitle the defendant to successfully set off the payment of $767 against the money received by him, it was necessary for him to show that

the amount he sought to set off had become a part of the debtor's estate. Does this testimony show it? We cannot see that it does. The money was advanced for the express purpose of making certain specific payments. Whether it was applied or not does not appear. If the money had been applied to preferred claims under the act and the amount for distribution by the trustees had been thereby increased, the estate of the bankrupt would have been to that extent indirectly benefited, but this does not appear, and it seems to us that it was necessary for the defendant to show specifically that the payment became 'a part of the debtor's estate,' in order to entitle him to use it as a set-off. This was not shown, and we cannot, therefore, convict the court of error in refusing to say to the jury that the set-off was established. The court below, in the opinion refusing a new trial, said: 'This $767 did not literally become a part of the bankrupt's estate. Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee. The most that defendant can ask,—and this we would probably hold,—is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a set-off.' It would, of course, not be necessary to show distinctly that the money was turned over to the trustee, but it was necessary to show that the estate was benefited in some way by the payment. This was not shown clearly; indeed, it does not affirmatively appear that the estate was in any way benefited directly or indirectly. The first assignment, therefore, is overruled."

Seventh. The Superior Court of Pennsylvania erred in holding the plaintiff in error liable to the defendant in error for interest in any amount whatsoever.

ARGUMENT.

The 1st, 2d, 4th, and 5th assignments of error may be grouped and argued under the

First Proposition.

THE PAYMENT OF $1,086.64 MADE AUGUST 4, 1898, BY THE DEBTOR TO THE PLAINTIFF IN ERROR WAS NOT A VOIDABLE PREFERENCE WITHIN THE MEANING OF THE 60TH SECTION OF THE BANKRUPT ACT OF 1898, AND THE TRIAL JUDGE SHOULD HAVE TAKEN THE CASE FROM THE JURY.

Most of the testimony is undisputed. J. S. and Gustave Kaufman were brothers, not living together, engaged in distinctly separate businesses, and totally unconnected in any business deals or enterprises.

Gustave Kaufman was in the contracting business. He had a large subcontract for city paving. He was paid near the first of each month for the estimated value of the work of the preceding month, with the usual amount held back until completion. The labor necessarily constituted a large percentage of the cost and had to be paid as the work proceeded. He found it necessary to borrow money from time to time.

In May, 1898, several of his brothers, including J. S. Kaufman, endorsed a note which he had discounted giving them an assignment of his plant as collateral security, and J. S. Kaufman had also endorsed a note for $3,000 which was discounted at Holmes' bank. The former note was paid in part after the bankruptcy of Gustave Kaufman by sale of the collateral, and the latter note was paid by Gustave Kaufman on August 4, 1898, its maturity date, by check improperly made to J. S. Kaufman and by him endorsed and de-

ivered by Gustave or his employee to the bank. These notes nd payments are not now in controversy.

During July, Gustave was in need of ready money and J. S. Kaufman loaned or advanced him during that month $200, $100, and $1,500, making $1,800 in all, and Gustave promised to repay these advancements when he secured his August estimate from the city, which would be due the first of the month. He got this estimate or payment on the 4th. Same day he paid off the note of $3,000 already mentioned and paid back to J. S. Kaufman $1,086.64 of the $1,800 advanced. No reason appears for the odd sum or for not paying the full amount, but we may well infer that such part payment exhausted the estimate, because on the 8th, or four days later, he came to J. S. Kaufman and requested a return of $767 of the amount paid on August 4 with which to pay some unpaid wages. This money was given back to him for that purpose.

He then ceased operations on the work and on August 20 filed his petition in bankruptcy. At that time J. S. Kaufman had been paid on account of his claim of $1,800 $1,086.64, less $767, or $319.64. But the trustee of Gustave Kaufman, W. T. Tredway, brought suit against J. S. Kaufman, plaintiff in error, for the $3,000, now out of the case, and for the $1,086.64 paid August 4, and alleged that such payments were not only preferences but voidable preferences, because J. S. Kaufman knew or had reasonable grounds to believe that Gustave Kaufman was a bankrupt at the time of payment.

The bankrupt act was passed and went into effect July 1, 1898. Section 60 of said act is as follows:

> "SECTION 60. (a.) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any

one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"(*b*.) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value, from such person.

"(*c*.) If a creditor has been preferred and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

Applying this section to the facts of this case as disclosed by the evidence, the payment of $1,086.64 made by Gustave Kaufman to J. S. Kaufman on August 4, 1898, would seem to be a preference. While the evidence is not conclusive, the books not produced and no statement of the debtor's condition shown as of that date, yet the evidence was probably sufficient when undisputed to warrant the conclusion that he was insolvent at the date of the said payment, and such payment was therefore a preference within the meaning of the act, and it was less than four months before the filing of the petition in bankruptcy. But this would not enable the trustee to recover unless such preference was voidable, and it was not voidable unless at the time it was given J. S. Kaufman, who received the payment, in the words of the act, "had reasonable cause to believe that it was intended thereby to give a preference."

We maintain that no such reasonable cause appears in the testimony.

On August 4, 1898, there does not appear anything in the testimony that was calculated to cause J. S. Kaufman to believe or even suspect that Gustave Kaufman was insolvent. The transactions of that day were, first, the one complained of, the payment of $1,086.64, and, second, the knowledge brought to J. S. Kaufman that Gustave Kaufman had other money, and was paying and apparently able to pay a maturing note of $3,000.

These payments were made by Gustave Kaufman, by his book-keeper, to J. S. Kaufman and to the bank. J. S. Kaufman and Gustave Kaufman were not together at all on that date, and there is not a word or deed recited in all the evidence that conveys the semblance of suspicion against the solvency of Gustave Kaufman. There were no suits, no obligations gone to protest, no creditors demanding claims—absolutely nothing to cause the slightest suspicion in the mind of J. S. Kaufman against Gustave Kaufman's ability to pay. On the contrary, there was the most powerful and convincing testimony in his favor, viz., the actual payment to him direct of a large sum and the knowledge of a much larger sum being paid to the bank in full payment of the only outside debt of Gustave Kaufman of which J. S. Kaufman had knowledge, except the family note of $6,000, hereafter considered, and which was secured by collateral.

To the mind of J. S. Kaufman, Gustave Kaufman was rapidly paying off his debts in cash, the money coming as his due from the city; and, far from suspecting his insolvency, J. S. Kaufman, had he been suspicious before, would have had those suspicions allayed by all the transactions and assurances of that day.

The $1,800 had been advanced on the strength of the next estimate which would be paid Gustave Kaufman the first week in August. Equitably that estimate, or so much thereof as would pay the debt, was assigned to J. S. Kaufman to secure the loan. The advancements and subsequent part payment were the same transaction. When that payment

was made, it was just what he expected and just when he expected it. It met his expectations in every particular save that it was not in full, and a reason for its not being in full appeared when the knowledge of the further payment of $3,000 the same day appeared by which the liabilities of Gustave Kaufman, so far as known to J. S. Kaufman, were reduced almost one-half. Beyond all question, therefore, if J. S. Kaufman had any reasonable cause to believe Gustave Kaufman insolvent on August 4, he must of necessity have acquired his grounds for the belief prior to that date, and his testimony (pp. 32 and 33) to the effect that on that date at the time of payment he had no knowledge of any insolvency on the part of Gustave Kaufman is strictly and absolutely true and correct.

The next preceding transaction that could influence the belief of J. S. Kaufman was the advancements of $200 July 7, $100 July 22, and $1,500 July 29. There is not a word in the evidence that has a suspicious sound in connection with these transactions. J. S. Kaufman knew the character of Gustave Kaufman's contract, to carry on which and pay labor and other bills required large amounts of cash. The first two amounts were small and the last was only to be for a few days—less than a week—until the August voucher should be received. The requests for these advances were not unusual, not suspicious.

The fact that J. S. Kaufman granted them showed his confidence and freedom from any suspicion. No fact anywhere suggested insolvency or danger of insolvency. The work was progressing, money was being earned and received by Gustave Kaufman. There were no creditors pressing or that could press within J. S. Kaufman's knowledge, and there was manifestly nothing in these advancements or their subsequent part payment that ought to have aroused suspicion in the mind of any reasonable man that Gustave Kaufman was insolvent.

The next preceding occurrence was the endorsement by

J. S. Kaufman and other brothers of a note for $6,000 for Gustave Kaufman about May 19. It was agreed among them at Gustave Kaufman's suggestion that he should give collateral for payment of this note in the shape of an assignment of certain property, as appears in Exhibit 6 printed herein at page 38. It was left to William Kaufman, one of the endorsers and a practicing attorney, to prepare this assignment, which he subsequently did, and it was signed by Gustave Kaufman on June 30.

Exhibit 6 was not and did not purport to be an absolute assignment or an assignment of all the debtor's property. It comprehended such property as is not often pledged as collateral which the brothers of the debtor were willing to accept, leaving free any other property he might have, real or personal. In fact, it clearly appears that the brothers, including J. S. Kaufman, had no anxiety about or fear of loss on the note because the preparation and execution of the paper, Exhibit 6, was delayed and not insisted upon from May 19 to June 30, and then only executed as a matter of form. Therein appears throughout the utmost confidence in Gustave Kaufman and his solvency.

At the conference on May 19, Gustave Kaufman told his brothers, as J. S. Kaufman testified, "that he was short of working capital, always had to wait until estimates came in, and that if he had some ready money he could get along so much better; and after consultation, after considerable argument in which he told us that he was in first-class shape, we agreed to endorse for him for six thousand dollars, taking as collateral security this paper" (Exhibit 6). This is the undisputed testimony (pp. 31 and 32) and it is supported and corroborated by that of William Kaufman (pp. 38 and 39).

The cross-examination of J. S. Kaufman (p. 34 *et seq.*) only emphasized this and developed the fact that J. S. Kaufman was not in touch with his (debtor's) affairs (p. 34), that there was no question or suggestion of a preference, no exhibition

of books or accounts of debtor that indicated bad financial condition, and that the collateral assignment did not, to the knowledge of J. S. Kaufman, include all the debtor's property. It also developed that J. S. Kaufman knew that the contract amounted to about $80,000 or $90,000, which was the basis of the monthly estimates and payments.

Whether or not Gustave Kaufman's statements of his financial condition to his brothers were or were not true can have no bearing on the case. No evidence appears that they had ever found him untruthful. His request was not unusual or unreasonable. The reasons given were plausible and business-like. He seemed in good financial shape. He further averred it. No suspicious circumstance appeared. He had a large and presumably profitable city contract. Payment, if slow, was sure and certain. He had proven himself competent by six or eight months' work, which had been approved and paid for in part. The work was proceeding with expedition. He apparently had no debts; at least no creditors were pressing. He had had some misunderstanding with Keeling & Ridge in January, but that was long past, and that firm was shipping materials right along and J. S. Kaufman had not been appealed to for help in that regard.

Clearly and undoubtedly it would have taken a very suspicious man to doubt the solvency of Gustave Kaufman at that time. None of his brothers did so doubt it. None of his creditors, so far as known, questioned it. J. S. Kaufman, as he testifies, believed it, and it is submitted that the transaction, under the circumstances shown, had in it none of the elements of suspicion, much less belief, that Gustave Kaufman was then in an insolvent condition, and there was not and could not be in this May transaction anything which might give J. S. Kaufman "reasonable cause to believe that he was obtaining a preference" by the payment of August 4. To find a basis for such a belief one must go outside any

evidence relating to this transaction and outside the bounds of reason and probability.

The next preceding and only other transaction that could by any possibility have furnished to J. S. Kaufman grounds to suspect the solvency of Gustave Kaufman on August 4 was the meeting in January between J. S. and Gustave Kaufman and Joseph Keeling, as related in testimony (pp. 20 to 24 and 31).

Assuming that the evidence of Keeling was properly admitted, the knowledge brought to J. S. Kaufman thereby was simply that Gustave owed Keeling & Ridge for some stone delivered on his city contract and the latter wanted payment or a guarantee before making any further shipments. Gustave Kaufman then laid before Keeling and J. S. Kaufman the condition of his affairs, told how his work was going on, how much partly finished work he had for which he could get no estimates, and said he would see that Keeling & Ridge got their money.

Keeling testifies that he understood that J. S. Kaufman was to help financially, at least his language would bear that interpretation, but such interpretation is flatly contradicted not only by J. S. Kaufman, but also by his own subsequent conduct in continuing to ship large quantities of stone without asking J. S. Kaufman to obligate himself therefor in any way and without conferring with him or acquainting him even with the fact of the shipments being made.

In addition, J. S. Kaufman testifies positively that he proposed to do no more than the banking part of Gustave's affairs, and, for example, pay out the money, O. K. the bills, and look after the business in that way.

But this proposition, whatever it was, gave J. S. Kaufman no knowledge of Gustave's affairs, and there is not a trace of evidence that his proposal was accepted by Gustave or that J. S. Kaufman ever secured any knowledge of Gustave's affairs beyond that received in the presence of Keeling and which satisfied Keeling that he was safe in shipping much

more stone, caused him to increase the credits from $5,500 to over $13,000 without security, and, in fact, the solvency of Gustave was never questioned by either J. S. Kaufman or Keeling so far as the evidence shows. The acts of both of them subsequently demonstrate that fact. They are presumably reasonable men and with reasonable cause they would have believed Gustave Kaufman insolvent; yet both by frequent subsequent acts showed entire absence of such belief or even suspicion.

This occurrence was seven months before the alleged preference of August 4. It was six months before the bankrupt law came into existence. From the conference thenceforward J. S. Kaufman heard nothing to raise a suspicion in his mind that Gustave's affairs were not progressing favorably.

If we assume that some doubt was in his mind in January, caused by Keeling's demand for payment, the satisfactory termination of the conference followed by seven months of silence and apparent satisfaction of everybody—the work meanwhile steadily progressing—would of a surety have entirely dissipated all such doubts. The occurrence was too remote and disconnected from the payment of August 4 to have connected them in any way or suggested in the mind of a doubting Thomas himself that such payment was intended as a preference.

But while the testimony of Keeling was clearly insufficient to furnish reasonable cause to plaintiff in error to believe Gustave Kaufman insolvent then or afterwards, it is contended that this evidence should have been excluded and that its admission is ground for reversal.

The trustee offered to prove by the witness, Joseph Keeling, page 21:

(1.) "That in January, 1898, Gustave Kaufman, then being indebted to him in quite a large sum of money and his notes having gone to protest—that he declined to sell any more stone to Gustave Kaufman."

Under this offer, the witness testifies, *not* that notes had gone to protest, but that the note was not yet due. The witness' words are. top page 22, "For the reason that he had sent word to the office that the note which was to come due in a day or two that he would not be able to pay." On page 23, "A. This note of $2600 that was to come due in a day or two. Q. Who was to take care of that? A. Keeling & Ridge, and we were to receive a new note for the whole amount. Q. Did you receive a new note? A. Then I received a note for five thousand and some dollars."

(2.) He also offered to prove that they "there discussed the financial condition of Gustave Kaufman with both Gustave Kaufman and Joseph S. Kaufman, the defendant here." The testimony is as follows, page 22:

> "Q. What was said?
> "A. Well, we just talked about getting our money, that was all.
> "Q. What did you say about the matter of your money?
> "A. I said I would not ship him any more stone unless I would get my money or get some guarantee——
> "Q. When you said you couldn't ship any more stone, then what was said to you?
> "A. We talked the matter over about the conditions and so on of his work going on and how much he had lying idle and was not finished yet and couldn't get no estimates and so on, and I told him if we could make some satisfactory arrangements for the money we would ship; and he said that he would see that I would get my money after this and then I was to take care of his note that was to come due in two days."

This is a wide discrepancy between the offer and the testimony. They did not, as the offer proposed, discuss the financial condition of Gustave Kaufman. All they talked about was about getting money for Keeling & Ridge.

(3.) He also offered to prove "that Joseph Kaufman there told him that Gustave Kaufman was not a good financier, and that he was in bad shape financially, and that he, Joseph S. Kaufman, was going to take charge of his affairs."

(*a.*) *Not a word in this witness' testimony that Joseph S. Kaufman told the witness that Gustave Kaufman was in bad shape financially.*

(*b.*) Witness testified directly contrary to the offer, page 23:

> "Q. What, if anything, did Mr. Joseph S. Kaufman, say to you in connection with the business, or of his taking charge of the business?
>
> "A. *He did not say he would take charge of the business;* he said Gus didn't have much idea of financiering and handling the money question, and he was going to help him out on that point."

On page 24, on cross-examination, the witness says:

> "Q. In this conversation you had with Joseph about the financial end, what do you mean by the financial end?
>
> (Witness hesitates.)
>
> "Q. What I mean by that is, what did Joseph say?
>
> "A. He said that Gus did not look out for this money question, handling the financial end of the concern.
>
> "Q. That is, watching the books?
>
> "A. The money and pay-rolls and such things as that; and that he laid things around and would leave notes get overdue and so on, and he was going to take care of that.
>
> "Q. As book-keeper?
>
> "A. No; I understood him as money man; to help him out with his money matters.
>
> "Q. What did he say to you that led you to that impression?
>
> "A. Because he said that he would see that these notes were paid when they became due."

Note here that the testimony directly contradicts the terms of the offer in some parts and that in other parts there is no testimony whatsoever to sustain the offer.

(4.) He offered to prove that Joseph S. Kaufman "assured the witness that if he would continue to ship stone to him that he would see that it was paid; whereupon, the witness continued to ship stone until the month of June, accepting promissory notes for the same, upon the express promise of Joseph S. Kaufman that he would see that they were paid."

The witness testified, as above pointed out, in regard to what (he says) defendant said in regard to the payment of notes and shipping of stone, but we submit (*a*) that this would not prove, as the offer proposed, either the bankrupt condition of Gustave Kaufman or the knowledge of Joseph S. Kaufman of his bankrupt condition, or (*b*) that the witness relied upon that statement, if it were made, because he testifies at the end of his cross-examination, page 24, as follows:

> "Q. What did he say that led you to that impression?
> "A. Because he said that he would see that these notes were paid when they come due.
> "Q. And you continued shipping?
> "A. After that we continued shipments until the last payment was refused or we were notified that he went under.
> "Q. Well, you were satisfied with the explanation then made and you continued shipping?
> "A. Yes, sir.
> "Q. Did you get any of Joseph's endorsements?
> "A. No.
> "Q. You were satisfied with Gustave's notes?
> "A. I was satisfied with that after the conversation with him and from what I heard. I would do anything that was right and I expected that Gus would do the same thing at the time."

Leaving out of consideration for the purpose of this discussion the fact that J. S. Kaufman directly contradicted this testimony of Keeling's, page 31, we submit that Keeling's own testimony to the effect that he was satisfied with Gustave's notes without any endorsement from Joseph or any other person completely nullifies the offer that witness relied upon the oral statement and assurance of Joseph that these notes would be paid as a basis for extending further credit to Gustave. The testimony of the witness rebuts the terms of the offer completely and renders its purpose absurd and unworthy of consideration, and, from the viewpoint of evidence, the witness' testimony immaterial.

(5.) The offer was objected to as irrelevant and immaterial, as being too remote and having nothing to do with the question of whether or not, on the 4th day of August, Joseph S. Kaufman had reasonable cause to believe that at that time Gustave Kaufman was bankrupt and that the money he was then receiving was preferential within the meaning of the act.

(*a.*) The offer should have been rejected because it did not go to prove the bankrupt condition of Gustave Kaufman nor the knowledge of Joseph S. Kaufman of his bankrupt condition.

(*b.*) It was too remote. There is too much of a jump and too wide an interim between January, '98, and August, '98.

(*c.*) It was an offer to adduce incompetent, irrelevant, and immaterial testimony in that stage of the case, because it was not accompanied by an offer to connect it by means of intermediate circumstances with August 4, 1898, the date on which the alleged preference was made, and without such connection it needs no argument to demonstrate that the event or conversation of January, 1898, even if it was suffi-

cient to prove all that the plaintiff proposed it should prove, was too remote in time and effect to establish that in August, 1898, plaintiff in error received the payments alleged to be preferences with reasonable cause to believe that they were preferences.

The general rule of evidence applicable to this case is asserted in Commonwealth *vs.* Brown, 23 Sup. Ct. Pa., 470, in these words:

> "Where the relevancy of an offer of evidence depends on other facts not in evidence it should be accompanied by an offer to prove those facts in a subsequent stage of the cause."

Also in Marshall *vs.* Faddis, 199 Pa., 397, a case of conspiracy, where Mr. Chief Justice Mitchell says:

> "To make the declarations of an alleged conspirator admissible in evidence against his co-conspirators, there must be preliminary proof of the joint purpose and action, not necessarily conclusive, but sufficent to submit to the jury on that fact; * * * 'Sometimes for the sake of convenience the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. *But this rests in the discretion of the judge, and is not permitted except under particular and urgent circumstances.*': (1 Greenleaf, sec. 111)."

Hill *vs.* Truby, 117 Pa. St., 320:

> "An offer of evidence must itself disclose all the facts which are necessary to establish its admissibility."

In order to entitle the trustee to recover in this case, he must prove that at the time when plaintiff in error received the alleged preferences, viz., on August 4, 1898, he then had reasonable cause to believe that he was receiving a prefer-

ence. This could not be established by proof that he had reasonable cause to believe that the bankrupt was in an insolvent condition in January, 1898. That period was too remote. Therefore the testimony of Keeling under the offer made was incompetent, irrelevant, and immaterial as being too remote. It follows that it should have been rejected unless—and this the trustee obviously failed to do—he also offered to connect that incident or conversation occurring in January, 1898, by successive events and circumstances with the event of August 4, 1898, the date of the alleged preference.

(6.) The effect of the testimony under the offer.—We have shown above (1) that in many respects the testimony was directly contradictory to the offer, and (2) that in many other respects the testimony does not sustain the terms of the offer, and (3) at that stage of the case and under the offer as framed was irrelevant and incompetent.

We now submit that Keeling's testimony was not sufficient to carry the case to the jury.

(a.) There was nothing in the conversation of January, 1898, to raise in the mind of plaintiff in error reasonable cause to believe that at that time Gustave Kaufman was insolvent. A note was coming due in a few days, and the conference was held between the witness Gustave Kaufman and J. S. Kaufman as to how that note was to be taken care of, Gustave Kaufman stating that he would not be able to pay it when it fell due. This would not indicate an insolvent or bankrupt condition, even if there had been at that time a bankruptcy law in effect. Under the bankrupt act of 1898, section 1, chapter 1, containing definitions, clause 15 defines an insolvent as follows: "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property * * * shall not, at a fair valuation, be

sufficient in amount to pay his debts." Under the bankruptcy act of 1867, a person was deemed insolvent who could not pay his obligations as they matured, and therefore there is a very wide discrepancy and distinction between a condition of insolvency as determined by the present bankruptcy law and such condition as defined or determined by the former act.

So that, even if we are to be bound by the present bankruptcy law, which was not then enacted or in contemplation of the parties, the fact that Gustave Kaufman could not, as he declared, pay the note which was to fall due in two days after the January conversation did not render him insolvent as defined by the present bankruptcy law.

(*b.*) The testimony of the witness Keeling relative to his subsequent business dealings with Gustave Kaufman after the conversation which occurred in January completely refutes the effect which the trustee offered or proposed that it would establish. He offered this conversation for the purpose of showing (1) the bankrupt condition of Gustave Kaufman; (2) the knowledge of J. S. Kaufman of his bankrupt condition. It did not prove anything of the kind. There was nothing in the testimony relating to the amount of Gustave Kaufman's property at that time or the amount of his liabilities. He testified that they discussed at that meeting ways and means as to how Keeling & Ridge were to get their money. The result was Keeling & Ridge undertook to take care of the note which was about to fall due and took a new note from Gustave Kaufman for the amount of their entire debt, including the amount of note about to come due, without any endorsement or guaranty whatsoever, amounting to over $5,000, and subsequently continued to extend credit to him upon his personal obligations without endorsement or guaranty until at the time of the failure in August, 1898, the credits extended by them to him amounted to over $13,000. This result, we confidently submit, indi-

cates that this conversation satisfactorily established in the mind of the principal creditor that Gustave Kaufman was not in a bankrupt condition at that time; and if that was the result in his mind, it is reasonable to presume that it created at least as favorable an impression on the mind of the defendant.

(c.) When the defendant requested the court to give binding instructions in his favor he refused to do so, and, as it appears from his charge, he based this decision in part upon the testimony given by this witness, showing that he took this testimony into consideration and submitted it to the jury, and therein, we say, he committed an error.

We have, perhaps, given more space to the discussion of Keeling's testimony than its importance deserves. If held that its admission was proper it falls far short, aside from its remoteness, as we have shown, of furnishing reasonable grounds for belief that Gustave Kaufman, seven months later, was insolvent. But if, as we believe, it was improperly admitted, then it furnishes additional grounds for reversal, and if this court should hold that there was sufficient evidence to send the case to the jury on the question of reasonable cause to believe the debtor insolvent the improper admission of Keeling's testimony would yet entitle the plaintiff in error to a reversal.

It must be borne in mind that the transactions of January, May, July, and August 4, as recited in the testimony, were all the opportunities afforded J. S. Kaufman from which to judge of the solvency or insolvency of Gustave. In those transactions alone, disconnected and remote from each other as they were, must be found reasonable cause to believe him insolvent, or else such cause is not found at all, and we submit with confidence that, with or without the testimony of Keeling, there are in any or all of those transactions no words or acts that furnish a scintilla of evidence toward causing

the ordinarily reasonable, prudent business man to believe on August 4 that Gustave Kaufman was insolvent as defined by the present bankrupt act.

Hence it follows that the first proposition has been sustained, and that for errors of the trial judge, as sustained by the Superior Court, in not taking the case from the jury and in admitting incompetent testimony, the case should be reversed.

In support of this contention and as construing the terms "insolvent" and "reasonable cause to believe" and the amount of proof necessary to establish same, we append the following citations:

Perry *vs.* Booth, 80 N. Y. S., 706 (previously reported in Perry *vs.* Booth, 67 App. Div., 235):

> Plaintiff, trustee of Skead, bankrupt, claims that certain transfers of lumber made by Skead in November and December, '98, to defendants were violative of section 60 of the bankrupt act. In the former trial the findings of the court below that defendants had reasonable cause to believe that the transfers complained of were received by defendants with knowledge that preferences were thereby intended, were reversed and the appellate court reached the conclusion that the facts did not establish anything to indicate that the defendants had reasonable cause to believe that a preference was intended. It also found that the necessary inference from the facts was that no preference was, in fact, created by any of the transactions. We do not find that in the second trial any additional facts were disclosed to distinguish the case in any material degree from the one first presented. In Benedict *vs.* Deshel, 77 App. Div., 276, 79 N. Y. S., 206, the appellate division for the first department recently held that a transfer is not voidable under section 60 of the bankruptcy act unless it appears that the bankrupt was insolvent at the time that the transfer was made; that the transfer actually created a preference; that the bankrupt intended to create a preference; and that the creditor had reasonable grounds to believe that a preference was intended.

The contention on the part of counsel for appellant is, in effect, that, assuming the existence of insolvency, the existence of reasonable cause for the belief may be inferred from the mere demand for security. They say in the brief: "We submit that the creditor who demands security for a previously unsecured debt at once and by that act brings himself within the category of those who have reasonable cause to believe that they are getting a preference."

A different view appears to have been taken by the Federal courts. In Grant *v.* Bank, 97 U. S., 80, in considering the quite similar terms of the former bankrupt act, Mr. Justice Bradley said: "A man may have many grounds of suspicion that his debtor is in failing circumstances and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim and have a strong desire to secure it; and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by the law * * * Hence the act very wisely, as we think, instead of making a payment or security void for a mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinary intelligent man."

It has also been held under the present act that the giving of security for a past-due demand is neither sufficient to establish knowledge of insolvency nor to put the creditor upon inquiry. The court said in *In re* Eggert, 43 C. C. A., 1, 8; 102 Federal, 735, 742: "To hold that a creditor receiving payment of or security for a past-due debt is by the mere fact of knowledge that the debt is past maturity put upon inquiry of his debtor's inability to pay all his debts, and that, under such circumstances, he received payment or security at his peril, would be to put at hazard many business transactions and make the act oppressive. The fact of such inability coupled with other facts and circumstances brought home to the creditor

might be sufficient to put him on inquiry; but this being the only fact from which the deduction is sought that the creditor had reasonable cause to believe his debtor insolvent, standing alone, it is insufficient to raise an inference of law that the creditor is chargeable with knowledge of the facts which inquiry would have elicited."

Judgment of court below in favor of defendants affirmed.

Sirrine *vs.* Stover Marshall Co., 64 S. Car., 457:

Under the bankrupt act of '67, a transfer was invalidated if creditor had reasonable cause to believe a debtor *insolvent;* while under the bankrupt act of '98, a transfer is invalidated if the creditor has reasonable cause to believe it was intended as a preference. Under the bankrupt act of '67, insolvency existed when the debtor was unable to pay his debts as they became due in the ordinary course of his daily transactions; while under the act of '98, insolvency exists when the debtor's whole property at a fair valuation is insufficient in amount to pay his debts. The rule established by decisions of the U. S. Supreme Court as to meaning of words "reasonable cause to believe, etc.," under the act of '67 is applicable in determining the meaning of the words "reasonable cause to believe it was intended as a preference" under the act of '98, since a reasonable cause to believe a preference was intended by the debtor involves a reasonable cause to believe the debtor to be insolvent, as a preference depends upon insolvency. The rule is thus stated in Grant *vs.* Bank, 97 U. S., 80:

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of the debtor's insolvency in order to invalidate a security taken for his debt. * * * He must have knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." To the same effect are Barbour *vs.* Priest, 103 U. S., 293; Stuckey *vs.* Bank, 108 U. S., 74; Toof *vs.* Martin, 13 Wall., 40; Hall *vs.*

Wagner, 16 Wall., 584; Buchanan *vs.* Smith, 16 Wall., 277; Dutcher *vs.* Wright, 94 U. S., 553; Bank *vs.* Cook, 95 U. S., 343. In the recent case of *In re* Eggert, 102 Fed., 735, the foregoing cases are considered and the rule applicable under the act of '98 was shown to be as follows:

"In determining whether the taking of a security by a creditor constitutes an illegal preference under the bankruptcy act of '98, section 60 (*b*), the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debts or from circumstances which give rise to mere suspicion in his mind of business insolvency. On the other hand, it is not essential that the creditor should have actual knowledge of or belief in his debtor's insolvency, but it is sufficient if he has reasonable cause to believe him insolvent. If facts and circumstances with respect to the debtor's financial condition are brought home to him such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose."

It would not subserve any useful purpose to discuss the testimony in detail, but considering it in the light of the principle stated, we agree with the court below that plaintiff failed to show that defendants, at the time of such payments, had reasonable cause to believe that such payments were intended as a preference for it was not shown that defendants or their agents had reasonable cause to believe that the assets of the bankrupts were insufficient to pay their indebtedness. The evidence shows that plaintiff, who was then acting as attorney for the bankrupts and who made said payments from the proceeds of a policy of fire insurance collected by him upon the order of the bankrupts, believed at the time that the bankrupts were solvent and so informed the agents of the defendants. Mr. S., agent for defendants, and Mr. McC., attorney for other creditors, both testified that they had no reason at that time to believe that the debtors were insolvent and no knowledge of any fact was brought home to them that should have put an ordinarily prudent man upon inquiry beyond such as they made of the plaintiff.

Harmon *vs.* Feldheim, 131 Mich., 470:

Bill by plaintiff, trustee of bankrupt, against defendants to set aside an assignment of collateral as a preference under the bankruptcy law. The bankrupts had been engaged in the banking business for more than thirty years, had a fine commercial rating and enjoyed a good standing in commercial circles. Defendant had been a depositor in the bank for five years. In July, 1900, he had three certificates of deposit, aggregating $27,000. Thirty days' notice was required before he could draw the money. He gave the formal notice on July 7, 1900, that he would require $17,000 in thirty days. At the end of that time bankrupts informed defendant that they could not pay the amount just then, and he then placed the matter in the hands of his attorney, co-defendant. The attorney examined into the affairs of the bank and consulted Mr. Don M. Dickenson, who was a depositor in the same bank and had an intimate acquaintance with the members of the firm. Defendant's attorney and other members of his family were also at the same time large depositors. The result of the negotiations was the execution on August 28, 1900, of the following agreement: (An agreement showing collateral security is then set forth wherein defendant appears to loan to bankrupts $25,000, and in consideration of that loan, certain collateral is assigned to him, the loan consisting of the money then on deposit to the defendant's credit.)

Held (after stating the facts and quoting section 60 (*a*) and (*b*): The sole question presented is, Did defendant and his attorney, acting for him, have reasonable cause to believe that debtors were insolvent, and did they make the assignment with the intent thereby to give a preference? The court below, in a written opinion, found that they did not. In this finding we concur. We deem it unimportant to set forth the evidence upon which the finding is based. We are satisfied that the defendants did not, at the time of the assignment, contemplate bankruptcy, and that both defendants had no information which led

them to believe, or which should have caused them to believe, that the firm was insolvent.

(NOTE.—The agreement above referred to contained the following recitals:

Whereas A. Ives & Sons are desirous of borrowing the sum of $25,000 from said Adolph Feldheim; and,

Whereas, the said Adolph Feldheim has on deposit the sum of $25,000 in cash now due and payable and subject to present withdrawal in currency; and,

Whereas, the said Feldheim is willing to lend said sum to A. Ives & Sons if satisfactorily secured concurrently with the making of said loan:

Now, therefore, etc., (assignment of collateral security follows).

Congleton *vs.* Schreihofer, 54 Atl. Rep. (N. J. C. App., 1903), 144. Opinion by Emery, V. C.:

Complainant, trustee in bankruptcy, filed this bill to set aside a conveyance made by bankrupt to defendant.

Second (p. 145). The trustee's right to recover the property from the creditor as an illegal preference is that, at the time of the conveyance, the debtor was insolvent, and the creditor or her agent had reasonable cause to believe that it was intended thereby to give a preference.

Proofs sufficiently establish that, at the time of the transfer, the debtor was insolvent, and the dispute on this branch of the case relates to the creditor having reasonable cause to believe that a preference was intended. * * *

(P. 146.) Creditor upon death of her husband, eight years ago, came into possession of a small sum of money, $500, which she loaned to her brother, the bankrupt, about two years after her husband's death. He was then carrying on business as a butcher in Newark. The loan was to be paid in six months, and a note for that period was given. It was not paid at maturity and a new note for another six months was given. This note was also renewed by a similar note, and the same course as to renewals was continued

down to 1896, when the last note for six months was given, and this was the note surrendered on receiving the deed. Interest was paid on the notes usually once a year and when the sister asked for it. For some time previous to July, 1900, when she received her last interest, Mrs. S., *on getting her interest from her brother, urged him to pay the money, but the brother did not do so, saying that he did not have the money then.* At this time he owned real estate in Newark, worth in all from $7,000 to $9,000 (or $1,000 to $3,000 above the mortgages), and also conducted a business in the market. The sister's urgency, from time to time, to pay the money borrowed, was not due to any apprehension on her part of his then or immediate insolvency, but to the fact that the money had been loaned so long and she wanted the money to lend to her daughter who had already some of her money on mortgage. *She urged him to sell some property and give her the money.* In July, 1900, when she came for her interest, she again urged her brother, as she said in the evidence in bankruptcy, "to give me the money or give me something that I can stand by." She said she did this because he had not given her any note for the "last couple of years." The brother then said, "I will give you the deed for my lots in the rear," and she says, "Of course I was then satisfied." Nothing appears to have been said at this time about the date for conveying the property and no further conversations took place in reference to the conveyance until after the deed was executed by the bankrupt, August 8, 1900, and left by him for record at the register's office. The deed was executed at the same time that he made several other conveyances and transfers, comprising substantially all his property, and he then stopped the business of marketing and it was continued by his sons, to whom he transferred it, in the same places where he had transacted business. The debtor evidently intended the conveyance as a preference to his sister, but he also intended it, I think, to carry out his promise made to her in July to convey the lots to her for her debt. She received the deed from the recorder's office after the adjudication in bankruptcy, and upon receipt of it, at once

delivered the note to her brother. At no time up to the delivery of the deed did she have any conversation with her brother about his debts to others, or about his financial condition, nor did she know that he had stopped business.

The complainant relied on a statement made by the debtor in the bankruptcy proceedings that he told her "she had better secure herself and take this deed for her note;" but whether this was in July when he paid the interest, or at the first interview after the deed was executed, is not clear from the debtor's statement, but this statement was not made by the bankrupt when examined on this hearing; and, as it was denied by the creditor, the statement of the debtor in his bankruptcy proceedings cannot now be considered against her as evidence given by her, or as evidence of the truth of the statement. *Nor does it, in my judgment, amount to such a statement by the debtor in reference to his financial condition as to charge her with reasonable cause to believe that he was then insolvent.* At the furthest, it could only give rise to a suspicion of insolvency, and suspicion is not reasonable cause for belief.

(The court then proceeds to discuss and reject the claim of complainant's counsel that the debtor was the creditor's agent in the execution and delivery of the deed, and that his knowledge of his own insolvency was chargeable to her.)

(The court then takes up the complainant's claim that the circumstances connected with the transfer were unusual and were such as to put the creditor upon inquiry as to her brother's financial condition, and that, having failed to make such inquiry, she is, therefore, chargeable with notice. These circumstances are that she agreed to take and did take the deed for the land without any examination of it by herself or counsel to see what it conveyed, or whether the title was good; that she does not know how many lots it conveyed, or their value, or whether it was encumbered. She left everything to her brother, she said, and did not ask or inquire into anything.) The circumstances show sufficiently, I think, that Mrs. S. relied entirely on her brother to carry out his agree-

ment to transfer the rear lots to her, and supposed he was doing so fairly and according to the spirit of his promise. This confidence the bankrupt abused by conveying only a portion of the rear lots and without informing her of this when he secured the delivery of his note. But her confidence in her brother was not unreasonable, nor, under the circumstances, do I think she was put on further inquiry. She knew what the rear lots were, in the ordinary meaning of the words, which she was entitled to accept; and her failure to make those inquiries about the title or encumbrances or descriptions which might be usual in case of purchase from a stranger, cannot be said in this case to be due to anything else than the confidence she placed in her brother that he was carrying out his promise in good faith. So far, therefore, as complainant's claim depends upon the creditor's belief or cause of belief that the debtor was insolvent, and a preference was intended, I conclude that no case has been made out by the trustee.

Netter, trustee, *vs.* Refowich, 12 Dist. Rep. (Pa.), 196:

October 7, '98, Moses R. gave to Morris R. a judgment note. October 17, '98, judgment entered on the note. Same day execution issued. October 19, defendant's personal property levied upon, and, on October 29, the same sold by the sheriff and the proceeds in part applied to costs of the writ and in part on the debt. November 14, '98, after the proceeds of the sale had been paid over, a petition to declare Morris R. bankrupt was filed against him, and on February 9, 1900, he was adjudged a bankrupt. January 10, 1901, this action was begun by the trustee against Moses R. to recover the amount paid to him, claiming that he had received a preference under sec. 60 (*a*) and (*b*) of the bankruptcy act.

The plaintiff rested after producing the foregoing testimony; and no testimony was introduced by the defendant; and a judgment was directed to be entered in favor of the plaintiff against the defendant for the amount of the claim.

Held: The question now is, did this defendant have

reasonable cause to believe that at the time the judgment was given, that it was given as a preference? It is incumbent upon the plaintiff, the trustee of the bankrupt, to establish this fact by testimony. * * *

From an examination of the testimony which is entirely that of certification of the records from the records of common pleas of Schuylkill county, and of the bankruptcy proceedings in the United States court, we are unable to conclude that these records are of a character that could have brought home in any way to this defendant knowledge that should have been of a nature to create in his mind a reasonable cause to believe that when Morris R. gave to him the judgment upon which his personal property was sold, that it was intended thereby to give him a preference. The testimony, in our judgment, was insufficient to submit to the jury for them to determine that, at the time of the giving of the note upon which judgment was entered, defendant had reasonable cause to believe that Morris R. was insolvent; and that, when the judgment was given to him, it was given as a preference to his other creditors. New trial granted.

The third and sixth assignments of error may be argued together under the

Second Proposition.

THAT IF THIS COURT SHOULD FIND THAT THE PAYMENT OF $1,086.64 WAS A VOIDABLE PREFERENCE, THEN THE PLAINTIFF IN ERROR IS ENTITLED TO A SET-OFF AMOUNTING TO $767.

Assuming for the argument that the first proposition falls, we have the case of one who, having knowingly received a preference, deliberately returns a portion of it in good faith extending further credit without any security whatever.

The plaintiff in error on August 8, four days after receiving the payment of $1,086.64 from the debtor, gave back at

debtor's request $767 with which to pay wages accrued All the testimony regarding this transaction appears at page. 33. At that date Gustave Kaufman had ceased work. "His trouble," as the witness terms it, had come on. The plaintiff in error then knew that Gustave was probably unable to pay his debts. With that knowledge and knowing he had already received a preference (under our assumption) he gave the debtor $767 in cash to pay labor claims, and no part of it has ever been repaid. Why cannot that sum be properly set off against the preference under clause (c) of said section 60 of the bankrupt act?

Let us analyze the terms of this clause and apply them to this transaction.

"If a creditor has been preferred"—we assume for the purpose of this argument that there has been a preference by reason of the payment on August 4.

"Afterwards"—payment August 4, set-off August 8.

"In good faith"—there is no doubt that the money was actually paid by plaintiff in error to debtor and its good faith is not attacked.

"Gives the debtor further credit"—he paid him the money. This is giving him further credit, just as much as if he was dealing with him in merchandise and had sent him more goods.

"Without security of any kind"—there is no doubt that plaintiff in error received no security for the advancement of August 8.

"For property"—money is property.

"Which becomes a part of the debtor's estate"—the debtor received the money. His petition in bankruptcy was not filed until August 20, 1898, and he was not adjudicated a bankrupt until August 27, 1898. Section 1 of the bankrupt act defines a bankrupt as follows: "Bankrupt shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed or who has filed a voluntary petition

or who has been adjudged a bankrupt." Now, it is very evident that until Gustave Kaufman filed his voluntary petition in bankruptcy he was not a "bankrupt." He was a "debtor" and he remained a "debtor" until his petition in bankruptcy had been filed. Therefore, when he received from plaintiff in error on August 8 $767, that money immediately became a part of his estate—that is, of the "debtor's estate." What he did with it or what he intended to do with it is immaterial. The testimony shows that he said that he needed the money to pay off his laborers. There is nothing in the testimony to justify any doubt but that he did apply the money for that purpose, but, whether he did or not, can make no difference. It is immaterial. As soon as he got it, it became his. It was his property, and it was necessarily then a part of his estate. We do not need to inquire whether or not the trustee, who was not appointed until January, 1899, found this $767 intact among his assets. That is not the test fixed by the bankruptcy act. The bankruptcy act does not say "bankrupt's estates." It says the "debtor's estates."

It is in the failure to distinguish between "debtor" and "bankrupt" that the trial court, as well as the Superior Court of Pennsylvania, erred. This is evidenced by the charge which, touching this matter, reads as follows (p. 42):

> "I am asked to charge with regard to an alleged set-off here. I do not see that there is any evidence which would justify me in saying that there is money that went into the estate of the *bankrupt* here. There is evidence that he paid some money that seems to have been appropriated to some other debts; but there is nothing which would justify a set-off, as I understand the testimony in the case."

And in his opinion refusing a new trial Judge McClung fell into the same error. He therein quoted the testimony and assumed as a matter of fact that Gustave Kaufman had received this money on August 8 from plaintiff in error. He

quoted this section of the bankruptcy act and still failed to distinguish between "debtor" and "bankrupt." He says (p. 45), "This $767.00 did not literally become a part of the *bankrupt's* estate. Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee." Then he says because we didn't prove that this money was used by the debtor for the purpose for which he said he wanted it—that is, to pay wages—we didn't have the right to claim set-off. Now, in our theory of this case, what the debtor did with the money after he received it is utterly immaterial. Whether or not he applied it for the purposes for which he said he wanted it, cannot affect the rights of the plaintiff in error. He gave the debtor the money. The debtor received it. As soon as he got it, it was his property, and, as his property, it became and was a part of his estate. Hence, what he did with it or what he did not do with it is entirely immaterial, and the lower court erred in holding, as appears from his opinion, that the burden was upon us to prove that the money was used for the purpose claimed, and that, unless we did prove it, we were not entitled to the set-off.

The Superior Court of Pennsylvania took the same view and made the same error as did Judge McClung in the lower court. This phase of the case appears in the opinion of the Superior Court as printed in the record on pages 48 and 49. A very casual reading of this portion of the opinion will demonstrate that the Superior Court failed to discriminate between the term "debtor" and the term "bankrupt" and they affirmed the lower court practically upon the latter's opinion refusing a new trial.

If the $1,086.64 payment of August 4 is a voidable preference, then we submit that this $767 payment must be allowed as a set-off, because otherwise the plaintiff in error will be charged with a preference of $1,086.64, whereas, if there was any preference at all, it would be only as to the

difference between the latter amount and $767 repaid August 8, 1898, or $319.64.

Here, then, all the requirements of clause (*c*) allowing set-offs have been met, and it follows that it was error in the trial judge to refuse to allow the jury to pass upon the question of allowing the set-off, which error the Superior Court affirmed.

Third Proposition.

NO INTEREST IS ALLOWABLE ON ANY AMOUNT RECOVERED IN THIS ACTION.

This proposition covers the seventh assignment of error.

The trial court allowed interest on the amount of the alleged preference from August 11, 1898, to date of trial to be included in the verdict. The Superior Court struck off so much as had accrued prior to the commencement of the suit, holding such commencement to be a demand for payment, and that interest was recoverable from that date.

Clause (*b*) of section 60 of the bankrupt act confers only the right to recover the property or its value. Manifestly in this case the alternative "or its value" has no significance. Money is property and the money was recovered. The money was $1,086.64, not more.

The act itself does not provide for interest, nor is interest an incident to the claim which the trustee is permitted to litigate. He is not authorized to sue as for damages, but for the recovery of the very preferential thing itself. There is no amercement for retention. The transaction which resulted in the alleged preferential transfer is simply avoided and annulled, and the debtor's estate is thus reinstated in the position as to possession it would have been in had the preferential transaction not been entered into.

The statute might have provided that the recovery should include interest, or even damages or other penalty; it does

not. It simply and only looks to restoration, and does not seek to make money by a transaction lawful except for the statute. With this construction, upon recovery the trustee is vested with the precise estate he would have had if the transaction had never been entered into, and, having that estate, the trustee could not put it to usance. Suppose the preference to have consisted of fixtures, still remaining in kind, could the recovery thereof have also included interest for the detention? Not, it seems to us, under the words of the statute, and, if not in such case, why recover anything more than its value?

Collier on Bankruptcy (3d edition, p. 369):

> The right given to the trustee to recover the property or its value is, in effect, a right to maintain replevin for specific property or trover for the conversion of the same.

The trial court did not, in his instructions to the jury, authorize them to add interest to the amount of the preference. They did so of their own volition. The Superior Court fell into error in treating the preference as an ordinary debt. To allow any interest whatever there must be read into the act something more than its plain and lucid wording signifies.

Respectfully submitted,

JOS. A. LANGFITT,
WM. KAUFMAN,
Attorneys for Plaintiff in Error.

EXHIBIT 6.

For value received, I hereby sell, assign, transfer and set over unto Joseph S. Kaufman, Sol Kaufman, Emanuel Kaufman, Sydney L. Kaufman and William Kaufman, their heirs and assigns, all that certain contractor's plant now being used by me in the construction and paving of part of Beechwood boulevard, Twenty-third ward, Pittsburg, and consisting of the following pieces of machinery and tools:

1 Russell roller, 12½ tons; 1 5 x 8 Lidgerwood hoisting engine; 2 derricks and fittings; 3 wire-rope blocks (one-horse power); 1,200 feet of ⅝-inch wire rope; 2,000 feet 1-inch wire rope; 1 electric motor and conveyor; in Winckler street sprinkler; 6 wooden blocks; 1 15-ton Dudgeon hydraulic jack; 1 15-ton jack; 10 contractor's dump cars; 2½ miles of track; three-foot gauge, including rails, ties, splice-bars, spikes, bolts, frogs and switches; a lot of picks, shovels, hammers, wheelbarrows, track and quarry tools; 1 wheeled scraper; 1 Wells light; 1 engineer's transit instrument and tripod; 1 engineer's level instrument and tripod. And I also hereby sell, assign, transfer and set over unto the above-named assignees, their heirs and assigns, all office furniture and paraphernalia, including books, maps, plans, drawings, typewriter and furniture contained in office rooms 808 and 809, Hamilton building, Fifth avenue, Pittsburg.

And I do also hereby sell, assign, transfer and set over unto the above-named assignees, their heirs and assigns, all my right, title, interest, claim and demand, whatever the same may be or amount to, of, in and to the household goods, furniture and effects of every kind, sort and nature contained in the house No. 644 Maryland avenue, Pittsburg, subject, however, to the title and claim of my wife to the said household goods, furniture and effects, she being the sole and absolute owner thereof.

This assignment is made for the purpose of indemnifying said Joseph S. Kaufman for his liability as endorser for me on a promissory note for $3,000 to N. Holmes & Sons; and for the further purpose of indemnifying all of the aforesaid assignees for their liability as endorsers for me on a certain promissory note for $6,000 due the Second National Bank of Pittsburg, it having been agreed that this assignment be given on the date of the last-mentioned indorsement.

In the event that I do not pay the said notes and the liability of the said assignees as endorsers shall thereby become absolute, I hereby consent and authorize them, the said assignees, to at any time after their liability becomes absolute, without further notice to me, sell the property hereby assigned, either at public or private sale, and to apply the proceeds thereof, after deducting all reasonable costs and expenses, to the debt hereby secured; and in the event that at such sale the sum realized shall exceed the amount of the debt hereby secured, then the residue, after deducting all costs and expenses, shall be returned to me.

Witness my hand and seal this 30th day of June, 1898.

(Signed) GUSTAVE KAUFMAN. [SEAL.]

FILE COPY.

17.

Office Supreme Court U. S.
FILED
OCT 21 1904
JAMES H. McKENNEY,
Clerk.

IN THE

United States Supreme Court.

[redacted]

JOSEPH S. KAUFMAN, Plaintiff in Error,

vs.

W. T. TREDWAY, Trustee in the Estate of GUSTAVE KAUFMAN, Bankrupt.

In Error to the Superior Court of the State of Pennsylvania.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM A. STONE,
H. L. CASTLE,
STONE & STONE,
Attorneys for Defendant in Error.

Smith Bros. Co., Franklin Print, 405 Grant Street, Pittsburg, Pa.

IN THE

United States Supreme Court.

No. 187 OCTOBER TERM, 1903.

JOSEPH S. KAUFMAN, Plaintiff in Error,

vs.

W. T. TREDWAY, Trustee in the Estate of GUSTAVE KAUFMAN, Bankrupt.

In Error to the Superior Court of the State of Pennsylvania.

Argument.

We believe that this case ought to be dismissed because there is no question stated or involved which, under the rules governing this court, you are required or authorized to answer. In the case of *Jewell vs. Knight*, 123 United States Reports, page 426, the syllabus says, "Questions certified to this Court upon a division of opinion of two judges in the Circuit Court must be distinct points of law, clearly stated so that they can be definitely answered without regard to other issues of law or of fact; and not questions of fact or of mixed law and facts involving inferences of fact from particular facts stated in the certificate; nor as the whole case, even if divided into several points."

The opinion in the above case discloses that the facts are not unlike the facts in the case at bar, and a quotation will be helpful. "In the present case general creditors of Knight seek to set aside as fraudulent against them a warrant of attorney to confess judgment executed by Knight to

secure the payment of money lent to him in good faith by his wife and his bankers, and a subsequent sale of his stock of goods to satisfy those debts.

"The statements (embodied in the certificate and occupying three closely printed pages in the record) of what the judges below call the facts found, is in truth a narrative in detail of various circumstances as to the debtor's pecuniary condition, his dealings with the parties to this suit and with other persons, and the extent of the preferred creditor's knowledge of his condition and dealings. It is not a statement of ultimate facts, leaving nothing but a conclusion of law to be drawn, but it is a statement of particular facts in the nature of matters of evidence upon which no decision can be made without inferring a fact which is not found."

"The main issue on the case upon which this decision must turn, and which the certificate attempts in various forms to refer to the determination of this court is, whether the sale of goods was fraudulent as against the plaintiffs. That is not a question of law, but a question either of fact or of mixed law and fact. Upon this record, therefore, this court cannot decide either that the decree of the Circuit Court should be affirmed or that it should be reversed or modified, but must order the appeal to be dismissed."

An in the case of *Brown vs. Atwell*, 92 United States, page 327, the Court said, "To give this Court jurisdiction over the judgment of a State Court it must appear that the decision of the federal question presented to that Court was necessary to the determination of the cause, and that it was actually decided or that without deciding it the judgment as rendered could not have been given.

And in the case of *Walter A. Wood Mowing & Reaping Machine Company vs. Skinner*, 139 United States, page 293, the Court said, "It is well settled by a long series of adjudications that to give this court jurisdiction by writ of error to the State Court, it must appear affirmatively not only that a federal question was presented for decision to the

highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

We submit that there was no federal question decided in this case. It is true that the basis of this action was the federal statute commonly known as the Bankrupt law, but there never was a moment during the entire controversy when there was any question as to the construction of that statute. At the initial stage of this case, the counsel for the plaintiff below and defendent in error here, as shown upon page 12, made this proposition : "If your Honor please, as I understand it, we must do two things here. We must show that Gustave Kaufman was a bankrupt. Then we must show further that J. S. Kaufman had knowledge of the fact that he was a bankrupt, or had reason to believe that fact. Now, what I am seeking to do at this point is simply to lay the foundation for the second. I want to show, as a matter of fact, that Gustave Kaufman was a bankrupt, and that it is demonstrated by the results in his estate ; and then, of course, if I were to stop there, I would not have succeeded at all, but I will have to go on and connect J. S. Kaufman with that," to which counsel for the defendant below and plaintiff in error in this Court, made response, "If you make an offer within the act, that if a bankrupt shall have given a preference within four months before the filing of the petition, or after the filing of the petition and before the adjudication and that the person receiving it or to be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, etc., if you propose now to follow this evidence to show that on August 4th we were in the category mentioned in this act, then I shall not make objection." The response of counsel for the plaintiff was, "I have no objection to making such an offer, to follow this testimony with such

testimony." By the Court, "Then there is no objection. Proceed."

A little later in the case in response to an objection by counsel for the defendant below, the Court said, "The Counsel for plaintiff has in his opening, and also in the case time after time, repeated the statement that he does not claim that he has made out any case until he shows that. We cannot require him to repeat it every time that he puts a question to the witness. If he does not show it, we will turn his case out of court. But we cannot have the interminable delay of having a repetition of that in connection with every question. We cannot require him to propose that in every question that he puts, when it is freely admitted all around that that is essential to his case." (See page 14 of Transcript of Record.) There never was a moment of time during the trial of this case when it was not agreed upon both sides of counsel table that in order to succeed, the plaintiff must satisfy the jury by the weight if the evidence that he must show, 1st, The bankrupt condition of Gustave Kaufman, and 2nd, That Joseph S. Kaufman knew or had reasonable cause to believe, when the payments were made to him that it was thereby intended to give him a preference. In the argument of this case by the plaintiff in error, their first proposition is(See page 6 of plaintiff's brief) "The payment of $1,086.64 made August 4th, 1898, by the debtor to the plaintiff in error was not a voidable preference within the meaning of the 60th section of the Bankrupt Act of 1898, and the trial judge should have taken the case from the jury." In the discussion of this throughout four or five pages it is simply a restatement of the evidence which was addressed at one time to the Common Pleas judge and afterwards to the State Supreme Court to the effect that there was not sufficient evidence of the facts to warrant submitting the case to a jury. As we understand the jurisdiction of this court, it is exactly that condition of affairs into which this court will not inquire. The case turned not upon the question of the law,

but the question of the fact, and three courts have said that it was properly submitted to the jury, and under the decisions above referred to, we believe that this court will not inquire into the merits of that submission.

The second question is like to it, namely, (See page 32, plaintiff's brief): "That if this Court should find that the payment of $1,086.64 was a voidable preference then the plaintiff in error is entitled to a set-off amounting to $767." This contention arose under another clause in the Bankrupt Act, which is as follows: (C) "If a creditor has been preferred and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be unrecoverable for him". There never was any question but that if Joseph S. Kaufman had brought himself by testimony within the lines of this provision he would have been entitled to a credit, but his Honor, Judge McClung, who was the trial Judge in the Common Pleas Court, in his opinion filed in refusing a new trial, disposes of the whole question (See page 45, Transcript of Record): "It is perfectly plain that the party who claims the benefit of a set-off must assume the burthen of showing that he gave further credit for property which became a part of the debtor's estate."

"This $767.00 did not literally become a part of the bankrupt's estate."

"Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee."

"The most that defendant can ask (and this we would probably hold) is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a set-off."

Under the Bankrupt Act, "Wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of the proceeding not to exceed $300.00 to each claimant" are in the 4th clause of preferred claims."

"Assume that this money was used to pay labor claims."

There is nothing whatever to show that the amounts paid were earned within three months, nor how much was paid to each claimant nor does it even appear that there is enough in the estate to pay the claims preferred to this 4th class."

"As to this branch of the case defendant stands in the position of a plaintiff seeking to recover, and has not made out a case which entitles him to go to the jury."

Justice Beaver, of the Superior Court, when the case was affirmed, says (see page 48 transcript of Record): "In order to entitle the defendant to successfully set-off the payment of $767.00 against the money received by him, it was necessary for him to show that the amount which he sought to set off had become a part of the debtor's estate. Does this testimony show it? We cannot see that it does. The money was advanced for the express purpose of making certain specific payments. Whether it was applied or not does not appear. If the money had been applied to preferred claims under the act and the amount for distribution by the trustee had been thereby increased, the estate of the bankrupt would have been to that extent indirectly benefitted, but this does not appear, as it seems to us, that the payment became "a part of the debtor's estates", in order to entitle him to use it as a set-off. This was not shown and we cannot, therefore, convict the court of error in refusing to say to the jury that the set-off was established."

In the opinion of *Beaupre vs. Noyes*, 138 United States, page 397, the Court said: "Although a case from the highest court of a State may involve a federal question, yet if that court proceeds upon another and distinct ground not involv-

ing a federal question and sufficient in itself to maintain the final judgment without reference to the federal question involved, this judgment will be affirmed here."

Upon the question now before us both the trial court and the Superior Court proceeded upon the theory that if the defendant below could show that this $767 became a part of the estate either by having gone to the trustee or by having paid such preferred claims as would increase the estate in the hands of the trustee, then they would be entitled to a set-off, but in either case the defendant's testimony falls far short of the proof required, and so the determination turned not upon the construction of the act, but upon the testimony submitted in support of the contention of the defendant under the act. We cannot see how the third proposition as set out on thirty-sixth page of the plaintiff's brief, namely, "No interest is allowable on any amount recovered in this action," raised any question over this court as to jurisdiction. Surely the question of allowance or disallowance of interest upon an amount recovered is not a federal question to be submitted and argued. We think this case should be dismissed for the reason that the assignments of error did comply with the requirements of this Court.

In the case of *Wilson vs. Barnum*, 8th Howard, page 258 this Court decided in substance that the point placed before your Honors for your decision must be a point of law only, not involving any question of fact or any question of discretion.

In the case of the *United States vs. Bailey*, 9th Peters, page 267, this Court decided that the certificate must cover single points of law, and not the whole case; precise single points must be certified. This, of course, does not mean one point, but single points that are capable of being decided without connection with any of the others.

And in the case of the *United States vs. Rosenberg*, 7th Wallace, page 580, the Court decided that the matter must not be such as appeal to the discretion Supreme Court. In the as-

signments before us, the first and second really contain all that is in the balance of the assignments, and each of the assignments is dependent for something upon some other one of the assignments, making it impossible to decide one without reference to the other, or to decide any one of them without the ascertainment of facts not contained in the point itself. That we may not seem to treat the argument upon the plaintiff's side of this case with any disrespect, we beg to submit this brief statement of the questions involved, how they arose and why the determination of them was right. The burden was originally upon the plaintiff to establish the insolvency of the debtor, and such knowledge either actual or inferred of the preferred creditor as made him liable to refund to the trustee. This cannot be stated too strongly. Collier on Bankruptcy, page 308, says very clearly that "however much there may have been a preference, that unless the creditor had knowledge of the bankrupt condition of the debtor or had reasonable cause to believe that the transfer was made with intent to give a preference, that it is not voidable." We sought to show these facts. The bankrupt condition of Gustave Kaufman is not controverted, and therefore needs no consideration. The only question is, "Was the evidence adduced by the plaintiff sufficient to carry the question to the jury as to whether J. S. Kaufman knew of this bankrupt condition at the time that he received the payments." They were brothers; J. S. Kaufman had indorsed for his brother, to assist him in raising money. He had participated in interviews upon the question of Gustave Kaufman's credit. He had procured further credit for his brother by an assurance that he would take charge of the financial end of Gustave Kaufman's affairs. He had taken an assignment of all the property which Gustave Kaufman had, even going so far as to include in that assignment all his interest in household goods which were claimed by the wife of Gustave Kaufman. We argued that these facts were sufficient, if believed, to warrant the jury in finding

that he had knowledge of his brother's condition, and that he ought not to have taken the $1,086.64 paid to him on the fourth of August, sixteen days prior to the filing of the petition in bankruptcy. Of course, Mr. Kaufman denied his knowledge of the insolvency of his brother, but that certainly did nothing more than raise an issue of fact to be submitted to the jury. It was submitted to a jury, who found against the defendant's contention. It is of no avail to argue that our testimony did not come up fully to the offers. We think they did, but whether they did or not, is not a federal question to be considered by this Court, and it was considered a determination by the Courts of the State of Pennsylvania.

In the discussion of the second question as to the right of setting off in the Court below, we took two positions. 1st. That J. S. Kaufman was not in the position to claim the benefit of this provision in the act. The provision recites, "If a creditor has been preferred and afterwards in good faith gives the debtor without security any kind of property which becomes part of the debtor's estate, etc., etc." We took then and restate now this position. This provision is made for the benefit of one who is in the class of preferred creditors, and who, discovering that fact, does the best that he can to remove himself from that class. Mr. Kaufman is contending here, and has throughout this case, that he is not a preferred creditor. If he is not a preferred creditor in his own estimate, he could not have returned in good faith any property to the estate of the debtor. It does not help him that the jury found he was a preferred creditor, for this merciful provision of the Act of Congress was for the purpose of protecting not a man whom a jury would say was a preferred creditor, but one who himself agrees he is a preferred creditor. The second position, and the one upon which the courts below relied in deciding this case, was that there is no evidence here that there was a payment which inured to the benefit of the estate of the bankrupt. This provision certainly does not mean simply that the creditor should

have given money or anything else to the bankrupt, for it specifically says that it must have been given to the bankrupt's estate and become a part of it. The only evidence we have on the subject at all is on page 33 of Transcript of Record, where this question and answer occur.

Mr Joseph S. Kaufman was asked the question, "Then after he had quit business you returned out of the money he had given you $767.00 to apply to the laboring people. That he did not have money enough to pay." Answer: "Yes, sir." There is no evidence that the money was so applied. There is no evidence that, if applied, it in any way inured to the benefit of the estate for it does not show that the claims came within the provision of the Act of Congress. There is no pretense of anything except that Joseph S. Kaufman paid to his brother, Gustave Kaufman, $767.00, and surely, with nothing more than that, it does not come within the provision of the act which says that it must have inured to the benefit of the estate.

The third question is the question of interest. We shall not take time to discuss it. If this Court is inquisitive upon the point at all, they will discover it was not raised in the Court below; it was not heard of until assigned in error in the Superior Court. At that time, the judgment was corrected by making the interest date from the time of the bringing of the suit rather than the time of the receipt of the money; because there would have to be a demand made before it would bear interest, and there was no evidence of demand prior to the bringing of the suit, but surely, there is no federal question involved in the determination of whether a given amount of money found by jury to be due to the estate of the bankrupt, should or should not, bear interest.

Respectfully submitted,

W. A. STONE
H. L. CASTLE
STONE & STONE
Attorneys for Defendant in error.

Supreme Court of the United States.

No. 17.—October Term, 1904.

Joseph S. Kaufman, Plaintiff in Error,
vs.
W. T. Tredway, Trustee of the Estate of Gustave Kaufman, Bankrupt.

In error to the Superior Court of the State of Pennsylvania.

[November 28, 1904.]

On August 20, 1898, Gustave Kaufman filed his petition in bankruptcy and was subsequently adjudged and decreed a bankrupt. W. T. Tredway was appointed trustee of his estate. On July 24, 1899, the trustee commenced suit in the Court of Common Pleas, No. 3, of Allegheny County, Pennsylvania, to recover from Joseph S. Kaufman the sum of $4,086.64, charged to have been given, on August 4, 1898, by the bankrupt to the defendant as a preference. The trial resulted in a judgment in favor of the trustee for $1,086.64 and interest. This judgment was affirmed on appeal by the Superior Court. An application for a further appeal to the Supreme Court of the State was denied, and thereupon this writ of error was sued out to review the judgment of the Superior Court. Section 60 of the bankrupt act is as follows:

"Section 60. (*a.*) A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"(*b.*) If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

"(*c.*) If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind of property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him." (30 Stat. 544, 564, chap. 541, July 1, 1898.)

Mr. Justice Brewer delivered the opinion of the Court.

Whether the bankrupt was insolvent on August 4, 1898, when he paid the money to his brother, the defendant, and whether the latter

had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, determined by the verdict of the jury, and not open to review in this court. *Hedrick* v. *A., T. & S. F. R. R. Co.*, 167 U. S. 673, 677; *Bement* v. *National Harrow Company*, 186 U. S. 70, 83; *Jenkins* v. *Neff*, Id. 230, and cases cited in opinions. It is suggested that the trial court erred in admitting testimony of transactions between the brothers some six or seven months prior to the payment by the bankrupt to the defendant; that such transactions were too remote from the time of the preference to throw light on the question of knowledge. We think that the testimony, whether of much or little value, was competent, and that it was not error for the court to admit it. *Clune* v. *United States*, 159 U. S. 590–592.

We see no reason to doubt the propriety of allowing interest on the claim from the commencement of the action. Such commencement is itself a demand.

The principal contention, however, is that the State court erred in ruling that the sum of $767, loaned by the defendant to the bankrupt on August 8, could not be considered as a set-off. It appeared that four days after he had received the money paid to him in preference the defendant handed to the bankrupt $767, on the latter's request for money to pay his employes. There was no testimony tending to show what became of this money, whether it was used in paying employes, or whether the payments, if made, were for wages earned within three months before the date of the commencement of proceedings in bankruptcy. All that appeared was the fact of the loan and the expressed purpose thereof. Under these circumstances the court instructed the jury that the defendant had not established his claim to a set-off, as authorized by paragraph *c* of section 60. This presents a distinct question of law.

The trial court, and its views were approved by the Superior Court, held that the statute required not merely that the creditor in good faith gave the debtor credit without security and that the money or property in fact passed to the debtor and became a part of his estate, but also that it remained such until the time of the bankruptcy and was transferred to the trustee, or at least that it was used in payment of preferred debts. In its opinion, on a motion for a new trial, it said:

"Evidence that the debtor got the money for another purpose certainly is not evidence that he turned it over to the trustee.

"The most that defendant can ask (and this we would probably hold) is that money shown to have been given and used to pay a preferred debt would entitle the defendant to a setoff."

It will be noticed that the words used in paragraph "*c*" are not "the bankrupt's estate," but "the debtor's estate." "Debtor" is also found in the preceding clause as descriptive of the one to whom the credit is given.

While the same person is both debtor and bankrupt, first debtor and then bankrupt, the use of the former term is suggestive of the time of the transaction as well as the status of the recipient of the credit. The paragraph further provides that "the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set-off." It is the non-payment and not the fact that the property remains still a part of the debtor's estate which entitles to a set-off. It would seem that if Congress intended that which the trial court held to be the meaning of the statute it would have said "which becomes a part of the bankrupt's estate" or "which becomes and remains a part of the debtor's estate until the adjudication in bankruptcy."

Further, Congress provided that the creditor act in good faith. Thus it excluded any arrangement by which the creditor, seeking to escape the liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings have terminated, or with some other wrongful purpose. It meant that the creditor should not act in such a way as to intentionally defeat the bankrupt act, but should let the debtor have the money or property for some honest purpose. Requiring that it should become a part of the debtor's estate excluded cases in which the creditor delivered the property to a third person on the credit of the debtor, or delivered it to him with instructions to pass it on to some third party. The purpose was that the property which passed from the creditor should in fact become a part of the debtor's estate, and that the credit should be only for such property.

Still again, to require that the creditor should not only in good faith have extended the credit and that the money or property should have passed into and become a part of the debtor's estate, but that he should also show the actual disposition thereof made by the debtor would in many cases practically deny the creditor the benefit of a credit which he has extended in good faith. Suppose three months and a half before bankruptcy the creditor, in good faith, sells and delivers a bill of goods to the debtor, a merchant, how difficult it would be to show what had become of each particular article on that bill, or what was done with the money received for those that had been sold; and the same when, as in this case, money was delivered to the debtor. If Congress had intended to require such proof it would seem that it would have used language more definite and certain. If the creditor has acted in good faith, extended credit without security, and the money or property has actually passed into the debtor's possession, why should anything more be required? Has the creditor not been already sufficiently punished when, having received money or property in payment of a just debt, he is compelled to refund

that to the trustee because he believed, or had reason to believe, that the debtor, in paying that debt, preferred him? Why should he be punished in addition by the loss of the benefit of a credit given in good faith?

We are of opinion that the State court erred in its construction of the statute and in peremptorily denying to the creditor the benefit of the credit. For these reasons the judgment of the Superior Court is reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.